# 82-2113

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

June 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

## QUESTION PRESENTED

Where petitioner's prosecution ended in a hung jury and his claim that retrial was barred by former jeopardy because the evidence was legally insufficient to have sustained his conviction was denied by the trial judge, whether the court below (2-1), after fully accepting petitioner's theory of double jeopardy, was thereafter in error by dismissing his interlocutory appeal for want of jurisdiction and ordering him to "run the gauntlet" of a second prosecution before the double jeopardy claim would be considered on the merits – a result precluded by *Abney* v. *United States*, 431 U.S. 651 (1977), and in *conceded* conflict with *United States* v. *McQuilkin*, 673 F.2d 681 (3d Cir. 1982).[1]

[1]Although the Court of Appeals never considered the evidence because of its dismissal of the appeal on jurisdictional grounds, if this was error, then the sufficiency of the evidence *vel non* would be a subsidiary question fairly included in the Question Presented.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases: Page

Page

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No.

---

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

### OPINION BELOW

The Opinion of the Court of Appeals (App. A, *infra*, pp. 1a-31a) is reported at 702 F.2d 1079. The district court rendered no opinion.

### JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 11, 1983, and a combined petition for rehearing and suggestion for rehearing en banc was filed on April 5, 1983. Both requests were denied on April 27, 1983. The

time within which to file a petition for a writ of certiorari extends to and including Monday, June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb
> * * *

## STATEMENT OF THE CASE

Petitioner and Leroy Cooper were jointly indicted in three counts alleging a conspiracy to distribute a controlled substance (21 U.S.C. 846), and two counts of distribution of a controlled substance. (21 U.S.C. 841(a)(1)) Cooper fled prior to trial and petitioner was tried to a jury resulting in a partial verdict of not guilty to one count of distribution and a mistrial on the remaining counts after a deadlocked jury. Thereafter, petitioner renewed his motion for a judgment of acquittal and also moved to bar retrial on the ground of former jeopardy. An interlocutory appeal from the denial of the double jeopardy claim was rejected by the court below on jurisdictional grounds.

Although the opinion below is silent concerning the evidence against petitioner, its brief outline is important because the clear insufficiency thereof breathes life into petitioner's otherwise academic claim. While our appellate brief fully ventilated the underlying facts, we will only undertake to distill their import for present review purposes.

That evidence – viewed in the traditional light most favorable to the government – established that on two oc-

casions, about one month apart, petitioner sold drugs to Leroy Cooper who purchased them for redistribution to John Lee, a federal agent. Cooper, a fugitive, did not testify at trial and Agent Lee could only recount his dealings with Cooper, because he never met with petitioner nor ever heard his name mentioned during the course of the investigation. Agent Lee was using an unsuspecting Cooper to buy drugs for him from various people in Washington; and, in addition to these two purchases from petitioner, Cooper bought drugs at least eight other times for Lee from *other* persons totally unassociated with petitioner. This was the totality of the evidence adduced to support a conspiracy alleged between Cooper and petitioner to jointly distribute drugs and to criminally ensnare petitioner for the two distributions to Agent Lee by Cooper on a conspiracy-partnership theory of responsibility.

## REASONS FOR GRANTING THE PETITION

The reasons for granting the instant petition are twofold:

1. There is a conflict in the resolution of the Question Presented between the circuits.

2. The opinion below collides head-on with *Abney v. United States*, 431 U.S. 651 (1977).

---

1. Since the issue generated by this petition will continually arise, it is appropriate for the Court to presently resolve the conflict between the circuits concerning the disposition of these interlocutory double jeopardy appeals based upon the claimed insufficiency of the evidence at trial. The majority opinion herein outlined the contradic-

tory resolutions of the jurisdictional question and aligned itself against the Third Circuit:

> "The appealability of the trial court's ruling on the double jeopardy claim is not as clear. Two circuits have held that the trial court's denial of a double jeopardy claim based on the insufficiency of the evidence is not immediately appealable under *Cohen*.[19] One circuit has held to the contrary.[20] We agree with the former view, . . ."
>
> [19]*United States v. Ellis*, 646 F.2d 132, 135 (4th Cir. 1981); *United States v. Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981).
>
> [20]*United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982). . . ."

App. A, *infra*, pp. 6a-7a.

2. In reaching its judgment the majority opinion, relying upon *Burks v. United States*, 437 U.S. 1 (1978), fully adopted petitioner's argument that it would be constitutional error to twice place him in jeopardy if the prosecution failed to produce legally sufficient evidence to support the indictment at his first trial.

While the right not to be retried in the circumstances presented was acknowledged, the remedy afforded petitioner was deferred until a second trial produced his conviction.[2] This deferred remedy solution radically departs from *Abney*, whose *ratio decidendi* is a Double Jeopardy Clause that prohibits retrials in violation of its precepts as the only effective method of enforcing the rights protected. Accordingly, interlocutory appeals were authorized lest those rights evaporate. Courts of appeal were thus

[2]Inferably, a second hung jury would not accelerate appellate review to foreclose yet another constitutionally impermissible retrial.

entrusted, *in limine*, with the duty of preventing unconstitutional retrials – not encouraging them. In announcing its result this Court spoke in precise legal terms unencumbered by factual considerations as did the majority opinion below in reaching a contrary result:

*Abney v. United States*, 431 U.S. 651 (1977).

"The rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence . . . . It is a guarantee against being twice put to *trial*[3] for the same offense. . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure*[4] to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

We therefore hold that pretrial orders rejecting claims of former

[3]Emphasis in original.

[4]*Id.*

*Majority Panel Opinion*

"[W]e hold that the defendant cannot appeal the trial court's double jeopardy ruling *at this time*[5] even though he may be required needlessly to endure the strains of a second trial." (App. A, *infra*, p. 2a)

• • •

We are aware that our decision increases the possibility that Richardson's double jeopardy right to be free from the rigors of an unnecessary second trial will be infringed since he will be required to endure the second trial before he is able to obtain appellate review of the trial court's ruling on the issue." (App. A, *infra*, p. 12a)

• • •

"Because a review of the issue at the base of the claims would undermine the policy behind the finality requirement of Section 1291, we hold that we cannot review those claims at this time, realizing full well that the trial court may have erred in its rulings and that as a result Richardson may be required to bear the rigors of an unnecessary second trial" (App. A, *infra*, p. 15a)

[5]*Id.*

> jeopardy, . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291."
> 431 U.S. 660-662.

The vice of the majority opinion is that by severing the remedy from the right, it has destroyed a symbiotic union incapable of independent existence and with it petitioner's constitutional right to be immediately set free. By creating a disparate remedy for redress, the court below has spawned a definable new class of double jeopardy cases not entitled to the "full protection"[6] of the Double Jeopardy Clause. Those protected by this newly created Deferred Double Jeopardy must await vindication of their rights by first experiencing an unconstitutional second trial. Petitioner is thus forced not only to endure "the personal strain, public embarrassment, and expense"[7] of an erroneous retrial, but worse, if convicted an additional physical penalty, *i.e.*, deprivation of his liberty while his rights are being vindicated on appeal.

In our experience, denial of bond pending appeal from a conviction would be routine herein because of the nature of the case, petitioner's prior conviction, and the government's tenacity in these matters. While this startling departure from *Abney* may inhere in the Double Jeopardy Clause, we do not believe that the court below was the appropriate tribunal to discover the constitutional abberation.[8]

---

[6] *Abney, supra,* at 662.

[7] *Id.*, at 661.

[8] The dissent is most persuasive in its reasons for finding appellate jurisdiction to consider the double jeopardy claim. Less compelling, however, is its medieval view of a Double Jeopardy Clause permitting petitioner to "run the gauntlet" as many times as is necessary to secure his conviction regardless of the insufficiency of the evidence prior thereto.

In achieving its result, the majority relies almost exclusively upon the theory that consideration of petitioner's claim would require, as an ingredient, a proscribed interlocutory appeal from the trial court's ruling on sufficiency of the evidence. By so concluding the court has both misinterpreted our argument, and unnecessarily strayed from the relevant target. Our brief was silent on seeking to overturn the trial court's sufficiency ruling. This obtains because our theory was grounded in the absence of sufficient evidence to support the indictment, and that insufficiency endures independent of and regardless of the trial court's judgment in the matter. In considering petitioner's claim, an appellate court may entirely overlook the district court's ruling and solely focus on the facts to determine whether or not *they* support the indictment. If they do not, retrial is barred. A reflexive consequency or by-product of finding insufficiency is the revelation that the lower court erred in finding to the contrary. Thus considered, it is a misstatement of the appellate review function sought to say that an insufficiency finding which innervates a double jeopardy claim, is necessarily also an appeal from the district court's evidentiary finding. Accord, *United States v. McQuilkin, supra,* at 685. It is not unique in the law that the same evidence may be properly considered for one purpose but not another. For example, a jury may not consider evidence of other crimes to infer that a defendant is a bad actor worthy of conviction, but may consider precisely the same evidence if it bears on a relevant issue in the case such as motive, intent, etc. *Drew v. United States,* 118 U.S. App. D.C. 11, 331 F.2d 85 (1964). The jury is then instructed how to utilize the evidence presented. Certainly if we entrust so delicate a task to lay jurors, appellate judges can *a fortiori* perform an analogous feat.

Alternatively, the bottom line is that *Abney* – as we and the dissenting judge read it – has already determined that all double jeopardy claims fall within the collateral order exception to the final judgment rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This Court did not say or intimate that some claims were arbitrarily excludable because their evaluation required consideration of the whole record. Indeed, in *Abney* itself, the Court appeared to have deeply delved into the trial record to support its finding that no double jeopardy violation existed. It is thus clear that whatever incidental steps are necessary to perfect appellate review must be taken lest that review be rendered meaningless or, as here, non-existent. By inverting the order of priorities – "Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency . . . ruling is overturned." (App. A, *infra*, p. 8a) – the majority has bootstrapped its conclusion and in the process turned *Abney* on its head.

At the pragmatic level, should petitioner obtain full review, that result would generate but a trickle of appellate cases. We are informed by the Administrative Office of the United States Courts, that for the twelve months ending December 31, 1982, the total number of cases retried after a mistrial in the entire federal system was 58.[9] This figure includes hung juries and mistrials for every other reason for which mistrials are declared, since no separate statistics are kept for hung juries. Mistrials resulting in dispositions by plea or dismissal are not included – nor statistically reported – and in any event, would not appear relevant to the case at bar. Accordingly, should

[9]Federal Judicial Workload Statistics, Ad. Off. U.S. Courts, Table D-2, p. A-36 (12 months ending December 31, 1982).

jurisdiction to entertain petitioner's claim exist, that result does not portend a crunch of appellate litigation.

If the Court of Appeals were reversed on the jurisdictional issue, then a review of the evidence in support of the indictment would be the next logical step to determine whether or not a retrial would, in fact, subject petitioner to a double jeopardy violation.

When we launched our appellate assault upon the indictment, we did not do so with the expectation of winning the battle and losing the war. From our angle of vision framed by several decades of experience in these matters, we pursued a good faith review fully convinced by the facts and the law that the instant indictment was totally unsupported by the evidence at trial. The reason for this unusual factual paucity was because the indictment was grounded in an erroneous conspiracy theory, the interment of which is long overdue.

Assuming for the purposes of this petition that the evidence established two narcotic sales by petitioner to Leroy Cooper[10] who, in turn, distributed the drugs to a

---

[10]Fuller briefing of the facts should our petition be granted, will destroy the notion that there was any evidence of petitioner's involvement in the first transaction for which he was acquitted by the jury. On that first occasion Cooper was observed to purchase drugs from a man driving a Mercury vehicle during daylight hours. This person was not identified and a surveillance agent who saw the seller place a phone call at a service station shortly after the transaction could not identify the caller as petitioner nor did he testify that the man resembled petitioner as to height or weight. The sole evidence relied upon by the prosecutor to link petitioner to this transaction was the fact that he was observed driving the same Mercury on the day of the second sale one month later. Ownership of the car was not established. Although this is essentially a one sale case, we are charitably assuming two sales in this petition to demonstrate the insufficiency of the evidence when even remote evidence is viewed in favor of the government.

federal agent, those acts by petitioner did not generate an indictable conspiracy. The classic Learned Hand opinion in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), reveals the utter failure to prove the conspiracy herein. In that case Peoni sold counterfeit bills to one, Regno; and Regno resold the same bills to one, Dorsey. All three knew the bills were counterfeit and Dorsey was latter arrested while trying to pass them. The issue was whether Peoni was party to a conspiracy by which Dorsey was to possess the bills. The government's theory was that, as Peoni put the bills in circulation and knew that Regno would be likely not to possess them himself, but to sell to another guilty possessor, the possession of the second buyer was a natural and foreseeable consequency of Peoni's original act. Judge Hand thought that this theory would have been of some moment in a civil case, but that it was unavailing to support a criminal conspiracy.

> "Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. . . . Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it. . . ." 100 F.2d at 403.

In *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972), one Godwin bought 50,000 amphetamine tablets from Spanos. Godwin testified for the prosecution that he had known Spanos for about a year and a half and "on occasions" bought pills from him. He, Godwin, resold the

50,000 pills to a federal agent named Herring. At trial, Spanos was convicted for conspiring with Godwin to sell and possess for sale stimulant drugs. Reversed on appeal.

> "[T]here is no evidence that Spanos had agreed with Godwin that Godwin was to resell to Herring or to anyone else. This does not show the charged conspiracy even, *prima facie*." 462 F.2d at 1015.

The Court so held even though it specifically found: "Like Peoni, Spanos sold, presumably knowing that Godwin would probably resell. . . ." 462 F.2d at 1017.

*A fortiori*, the instant case, which contains not one shred of evidence concerning any agreement between petitioner and Cooper,[11] fails to make out any case at all to support the conspiracy alleged. Cf. *United States v. Meyers*, 646 F.2d 1142, 1145 (6thCir. 1981) ("Insufficient evidence to show that Calvin and Meyers conspired to distribute cocaine. The evidence showed only a buyer-seller relationship between them."); *United States v. Bostic*, 480 F.2d 965 (6th Cir. 1973) ("There is no evidence that . . . Bartlett ever entered a single counterfeiting conspiracy with [4 persons] to . . . sell and utter counterfeit money. . . . The utmost that could be claimed . . . is that [he] sold counterfeit bills to Bostic. If it be assumed that he did sell such . . . bills to Bostic, the law is plain that he was not guilty of the conspiracy claimed." Citing *Peoni*.); *United States v. Ford*, 324 F.2d 950 (7th Cir. 1963) ("The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of

---

[11]The second sale was also based on circumstantial, but sufficient evidence, showing petitioner's sale to Cooper through a third person.

the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."); *United States v. Reina*, 242 F.2d 302 (2nd Cir. 1957); *United States v. Koch*, 113 F.2d 982 (2d Cir. 1940) ("The purchase of the cocaine from Mauro was not enough to prove a conspiracy . . . they had no agreement to advance any joint interest.")

The theory of the two substantive counts was that the distribution to Agent Lee by Leroy Cooper concomitantly established petitioner's culpability by virtue of his criminal partnership with Cooper. *Pinkerton v. United States*, 328 U.S. 640 (1946). When the evidence to support the conspiracy failed, so too did petitioner's responsibility for Cooper's unlawful conduct. *Travers v. United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964). See also *Sealfon v. United States*, 332 U.S. 575 (1948).

## CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict in the circuits, dispel the claim that *Abney* permits unconstitutional retrials before double jeopardy rights can be vindicated, and to preclude an unconstitutional retrial of petitioner.

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

## APPENDIX A



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 81-2029

UNITED STATES OF AMERICA

v.

ROBERT D. H. RICHARDSON, APPELLANT

---

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 81-00104)

---

Argued 4 October 1982

Decided 11 March 1983

*Allan M. Palmer*, for appellant.

*Marc Tucker*, Assistant United States Attorney, for appellee. *Stanley S. Harris*, United States Attorney, *John A. Terry*, Assistant United States Attorney at the time the brief was filed, *John R. Fisher*, *William J. O'Malley, Jr.*, and *Kathleen E. Voelker*, Assistant United

States Attorneys, were on the brief, for appellee. *Michael W. Farrell*, Assistant United States Attorney, also entered an appearance for appellee.

Before: TAMM, WILKEY and SCALIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Circuit Judge* SCALIA.

WILKEY, *Circuit Judge*: This case highlights the tension created by the intersection of a criminal defendant's double jeopardy right to avoid the rigors and embarrassment of an unnecessary second trial and the long-standing rule that a criminal defendant has no constitutional right to an appeal. Because the present appeal does not fit within the scope of our appellate jurisdiction, we hold that the defendant cannot appeal the trial court's double jeopardy ruling *at this time* even though he may be required needlessly to endure the strains of a second trial.

## I. BACKGROUND

Appellant, Robert D. H. Richardson, was indicted for conspiracy to distribute a controlled substance [1] and for two counts of distribution of a controlled substance.[2] His motion for a judgment of acquittal on the ground that the government had failed to produce legally sufficient evidence was denied both at the close of the government's evidence and immediately before submission of the case to the jury. The jury acquitted on one of the two distribution counts but was unable to reach a verdict on the conspiracy and remaining distribution counts. The court declared a mistrial and scheduled retrial, whereupon appellant renewed his motion for judgment of acquittal, and in addition moved to bar retrial on the basis of former jeopardy. This appeal was taken from the denial of those motions.

---

[1] 21 U.S.C. § 846 (1976).

[2] *Id.* § 841(a)(1).

It is important at the outset to understand the nature of Richardson's double jeopardy claim. Contrary to the dissent's implication,[3] Richardson does not claim that the jury's failure to reach a verdict bars retrial. Instead, citing *Burks v. United States*,[4] in which the Supreme Court held that a criminal defendant could not be retried after an appellate court determined that the evidence presented at his first trial was legally insufficient, he contends that "*no matter what the jury did* [he] cannot be retried *since the evidence was insufficient to submit to the jury in the first instance.*"[5] Thus, Richardson's double jeopardy claim is based *entirely* on his contention that the evidence at the first trial was legally insufficient. Since the trial court ruled that the evidence presented at the first trial *was* sufficient, Richardson's double jeopardy claim has meaning only if that ruling can be overturned. Our ability to rule on Richardson's double jeopardy claim in any meaningful manner therefore depends on the appealability of the trial court's ruling on the sufficiency of the evidence. Because the sufficiency issue cannot now be reviewed, we hold that Richardson is not entitled to appellate review of his double jeopardy claim at this time.

## II. Appellate Jurisdiciton

In determining the appealability of an issue arising in a federal criminal proceeding, it is important to remember that in a criminal case "there is no constitutional right to an appeal."[6] Thus, it is not possible for Richardson to argue that the double jeopardy clause *requires* us to entertain the present appeal. The appealability of Richardson's claims depends solely on whether Congress

---

[3] Dissenting op. at 7.

[4] 437 U.S. 1 (1978).

[5] Appellant's Brief at 33 (emphasis added).

[6] *Abney v. United States*, 431 U.S. 651, 656 (1977) (citing *McKane v. Durston*, 153 U.S. 684 (1894)).

authorized such appeals under 28 U.S.C. § 1291.[7] Since a final judgment has not been reached by the court below,[8] appeal under section 1291 in turn depends on Richardson's ability to bring his claims within the collateral order exception to the final judgment rule. This rule was first recognized in *Cohen v. Beneficial Industrial Loan Corp.*[9] and was reiterated in the context of a criminal case in *Abney v. United States.*[10]

To come within the reach of the *Cohen* exception, the decision in question must meet three tests. First, it must fully dispose of the controverted issue; in no sense may it "leave the matter 'open, unfinished or inconclusive.'"[11] Second, it must not be "simply a 'step toward final disposition of the merits of the case'"; it must resolve "an issue completely collateral to the cause of action asserted."[12] Finally, the decision must involve "an important right which would be 'lost, probably irreparably,'" if review awaited final judgment.[13]

We have little difficulty in applying this test to the district court's ruling on Richardson's insufficiency claim.

---

[7] Section 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

[8] "Final judgment in a criminal case means sentence. The sentence is the judgment." *Parr v. United States*, 351 U.S. 513, 518 (1956) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

[9] 337 U.S. 541 (1949).

[10] 431 U.S. 651 (1977).

[11] *Abney*, 431 U.S. at 658 (quoting *Cohen*, 337 U.S. at 546).

[12] *Id.*

[13] *Id.*

That ruling fails to meet the second and third requirements of *Cohen*. As two other circuits have noted, the legal sufficiency of the evidence presented is "a completely non-collateral issue." [14] This is because the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged. A defendant who chooses to go to trial is not guilty unless the prosecution is able to prove beyond a reasonable doubt that the defendant committed the crime.[15] If the evidence presented at the first trial was legally insufficient, Richardson is automatically not guilty. Thus, the sufficiency of the evidence is anything but collateral to the merits of the upcoming trial (*i.e.*, the question of defendant's guilt, for this is *determined by* the sufficiency of the evidence); rather, it is a "step toward final disposition of the merits of the case [which will] be merged in the final judgment," the type of issue which is *not* covered by the collateral order exception.[16]

Further, the right to appellate review of the issue will not necessarily be lost if we refuse review at this time. Three circuits have held that a criminal defendant can challenge the sufficiency of the evidence presented at his first trial (which resulted in a hung jury) when appealing his conviction at the second trial.[17] Indeed, in the

---

[14] *United States v. Ellis*, 646 F.2d 132, 134 (4th Cir. 1981). *See also United States v. Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981).

[15] *Jackson v. Virginia*, 443 U.S. 307, 313-16 (1979).

[16] *Abney*, 431 U.S. at 658.

[17] *United States v. Balano*, 618 F.2d 624, 632 n.13 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (——); *United States v. Bodey*, 607 F.2d 265, 267-68 (9th Cir. 1979); *United States v. Wilkinson*, 601 F.2d 791, 794-95 (5th Cir. 1979). The dissent challenges our assertion that the sufficiency issue is ultimately reviewable, implying that the paucity of precedent to support that position is telling. Dissenting op. at 14. However, as the dissent notes, there are five federal courts of appeals' decisions which support our position in dicta and three

present case the government concedes that Richardson's insufficency claim will not be lost if it is not reviewed at this time, noting that "in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction." [18] Therefore, because the insufficiency claim does not meet either the second or third *Cohen* requirements, we cannot review that claim until after a final judgment is entered.

The appealability of the trial court's ruling on the double jeopardy claim is not as clear. Two circuits have

---

federal circuits which have held that our assertion is correct. On the other hand, the dissent is able to cite only C.J.S. and a 1953 Alabama state court case which quotes C.J.S. as support for its position. Dissenting op. at 15.

[18] Appellee's Brief at 14 n.3. The dissent reproves us because we suggest that appellate courts can vindicate the constitutional rights of a criminal defendant *after* he has been convicted. Dissenting op. at 5-6. *See also id.* at 1, 16. As a matter of indisputable fact, that is what appellate courts do all the time. It seems that the real cause of this displeasure is not our decision, but decisions made by other institutions. The dissent may really be expressing disapproval of Congress' decision to give a criminal defendant the right to appeal his conviction since *every time* an appellate court reverses a criminal conviction it sets the "guilty" criminal free, or, in some cases, creates the possibility that he will be set free. The dissent may also disagree with the policy behind the double jeopardy clause. In *Burks v. United States*, 437 U.S. 1 (1978), the Supreme Court held that the double jeopardy clause required that the defendant be set free despite his earlier conviction. Finally, the dissent may have a basic disagreement with the rule reiterated by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), that regardless of what the jury does, a criminal defendant is not guilty unless the prosecution presents evidence from which a rational juror could conclude beyond a reasonable doubt that the defendant had committed the crime. In any event, we refuse to shy away from the result we feel is compelled by law merely because it permits a criminal defendant to argue at the appellate level after a second trial that his conviction was obtained under constitutionally impermissible circumstances.

held that the trial court's denial of a double jeopardy claim based on the insufficiency of the evidence is not immediately appealable under *Cohen*.[19] One circuit has held to the contrary.[20] We agree with the former view,[21]

---

[19] *United States v. Ellis*, 646 F.2d 132, 135 (4th Cir. 1981); *United States v. Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981).

[20] *United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982). In *McQuilkin* appellants appealed from a district court order vacating their criminal contempt convictions before a magistrate because the first trial was improperly conducted without a jury, and remanding for a new trial. It differed, therefore, from *Becton*, *Ellis*, and the present case in that it involved a new trial after conviction by a *magistrate* (but not by the court), rather than after jury failure to reach a verdict. We consider that distinction inconsequential to the jurisdictional issue; the essential elements of (1) a second trial before final judgment was entered and (2) the asserted inadequacy of evidence at the first trial were present.

[21] The different results reached by the three courts reveal the different manner in which *Abney* can be interpreted. In *Abney* the Supreme Court held that "pretrial orders rejecting claims of former jeopardy, such as that presently before us," fall within the *Cohen* exception to the final judgment rule. 431 U.S. at 662. The Fourth and Fifth Circuits read *Abney* as a decision permitting application of the *Cohen* exception to a double jeopardy claim only when the issues presented by that claim meet all three of the *Cohen* requirements. *Ellis*, 646 F.2d at 134-35; *Becton*, 632 F.2d at 1296-97. The Third Circuit, on the other hand, would read *Abney* more broadly—as authority for immediate appeal of all double jeopardy claims, focusing on "the nature of the *right* protected." *McQuilkin*, 673 F.2d at 684 (emphasis added). Although there is language in *Abney* which can be read as suggesting that the need to protect a defendant's right to avoid the rigors and embarrassment of an unnecessary second trial is so great that all double jeopardy claims are immediately appealable, *see Abney*, 431 U.S. at 660-62, we refuse to read the decision that broadly. The argument that the nature of the *right* involved in a double jeopardy claim *requires* an appellate court to immediately review all denials of a double

although for reasons slightly different from those advanced by the Fourth and Fifth Circuits.

As noted earlier,[22] Richardson's double jeopardy claim is premised entirely on the assumption that the trial court's ruling on the sufficiency issue was erroneous. As also noted earlier,[23] the propriety of the trial court's ruling on that issue cannot be reviewed by an appellate court at this time. Therefore, since Richardson's double jeopardy claim exists at the appellate level [24] *only* if the district court's sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time. In other words, because this court is unable to address the sufficiency issue at this time and because that issue is the *only* basis for Richardson's double jeopardy

---

jeopardy claim is in reality an argument that the Double Jeopardy Clause *requires* immediate appellate consideration of such claims. In order to accept that argument, the Supreme Court would have had to overrule the traditional rule that a criminal defendant has no constitutional right to an appeal. *See supra* text at note 6. We do not think the Court intended to accomplish such a radical change in the law when it rendered its decision in *Abney*, especially since it expressly reaffirmed the rule in that case. *Abney*, 431 U.S. at 656.

[22] *See supra*, text at notes 3-5.

[23] *See supra*, text at notes 14-18.

[2] The dissent's discussion of when a double jeopardy claim "exists," Dissenting op. at 4-5, tends to obfuscate the real issue being decided. Richardson's double jeopardy claim does not exist on appeal for the reason that, separated from his insufficiency claim, it is meaningless. Richardson's double jeopardy claim is composed of two arguments: (1) that the evidence presented at the first trial was insufficient, and (2) that the prosecution's failure to produce sufficient evidence bars retrial. Since we cannot accept the first argument at this time (because the trial court's adverse ruling on the issue cannot now be reviewed), the claim is deprived of one of its essential elements. Whether the claim continues to exist in some metaphysical sense is beside the point.

claim, Richardson has failed to make *at this time any* double jeopardy claim which can be reviewed by an appellate court.[25]

The analysis outlined above may be self-explanatory. However, lest the simplicity of that analysis camouflage the complexity and importance of the issue being decided, we undertake to state our reasoning in another manner. Despite the fact that Richardson's underlying claims are constitutional, the jurisdictional issue in this case concerns only the *timing and scope of appeal*, a question of *statutory interpretation*. That jurisdictional issue is not an easy one, however, because of the nature of the legal issue underlying both claims—the sufficiency of the evidence—a legal issue which requires full review of the entire record created at the trial level. In resolving that issue, there appear to be at least four alternatives available to us. First, we would read section 1291 so as to permit full review of both the double jeopardy and the insufficiency claim at this time. Second, we could interpret the statute so as to authorize immediate appeal of the double jeopardy claim, but not of the insufficiency claim. Third, we could deny immediate review of the present claims and wipe the slate clean, thereby precluding review. Finally, we could, as we do, conclude that the finality requirement of section 1291 precludes immediate appeal of any claim involving the sufficiency of the evidence, but that full review of both claims could be had after a final judgment is entered in the second trial.

---

[25] The dissent fails to explain how it would distinguish Richardson's insufficiency claim from his double jeopardy claim in terms of appealability. Since the legal issue at the base of both claims is precisely the same, *i.e.*, whether the evidence presented at the first trial was legally sufficient, we fail to see how the two claims can be distinguished under *Abney*, which focused on the collateral nature of the legal *issue* involved. *See Abney*, 431 U.S. at 658.

The first alternative is unacceptable. The entire purpose of the finality requirement of section 1291 is to "discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." [26] That purpose would be greatly undermined if a criminal defendant could interrupt the trial proceedings to seek appellate review of the trial court's ruling on the sufficiency of evidence presented. Indeed, the established rule in this circuit, as well as in other circuits, is that denial of a motion to acquit on the ground of insufficient evidence is *not* a final decision within the meaning of section 1291.[27] Nor does the insufficiency claim fit into the *Cohen* exception, as noted above.[28] Further, granting jurisdiction to review a double jeopardy claim made after a declaration of mistrial caused by a hung jury would implicate the longstanding rule that retrial after a hung jury is not barred by the double jeopardy clause.[29] Therefore, the panel unanimously repudiates the first alternative. However, at that point the unanimity ends. The dissent would adopt a mixture of the second and third alternatives (alternatives which are not inextricably connected), and we adopt the fourth, concluding that both the second and the third alternatives are undesirable.

Authorizing immediate review of the double jeopardy claim without reviewing the insufficiency claim which

---

[26] *DiBella v. United States*, 369 U.S. 121, 124 (1962).

[27] *Cephus v. United States*, 324 F.2d 893, 895 (D.C. Cir. 1963). *See also United States v. Young*, 544 F.2d 415, 416 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *Gilmore v. United States*, 264 F.2d 44 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959).

[28] *See* text at notes 14-18.

[29] *Keerl v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)).

gives it life (the second alternative) is unacceptable because it renders meaningless the review granted. The dissent would adopt this alternative because of the nature of the right involved in the double jeopardy claim. However, the dissent would assert jurisdiction over the double jeopardy claim and then perfunctorily dismiss it as frivolous without examining the argument underlying the claim. If, as the dissent asserts, the protection of Richardson's double jeopardy rights is so important that immediate review should be granted, that review should be meaningful, not merely cursory.

Completely precluding review of the insufficiency claim (the third alternative) is even more unpalatable.[30] The elimination of Richardson's right to have the trial court's determination of sufficiency reviewed would increase the likelihood that the government would be given a second chance to convict Richardson even though it failed to produce legally sufficient evidence the first time it had a full and fair opportunity to do so. This is one of the primary evils the double jeopardy clause was designed to prevent. As the Supreme Court has noted, the double jeopardy clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."[31] Thus, wiping the slate clean after the first trial

---

[30] The dissent reprimands us for our disregard of Richardson's rights. Dissenting op. at 1. Such a charge is ironic since it is advanced in an opinion which advocates the adoption of both the second and third alternatives outlined above. We hold that appellate consideration of Richardson's insufficiency and double jeopardy claims must be *delayed*. The dissent would *completely preclude* review of the former claim and *render meaningless* any review of the latter. One need not wonder which result Richardson would prefer.

[31] *Tibbs v. Florida*, 102 S.Ct. 2211, 2218 (1982) (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). *See also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980).

would permit the government to bolster its case and convict the defendant at the second trial without ever being held accountable *at the appellate level* for its possible failure to produce legally sufficient evidence at the first trial. We find no justification for this impairment of Richardson's rights.

We are aware that our decision increases the possibility that Richardson's double jeopardy right to be free from the rigors of an unnecessary second trial will be infringed since he will be required to endure the second trial before he is able to obtain appellate review of the trial court's ruling on the issue. However, because the rights infringed by *postponing* review are less absolute than those infringed by *precluding* review and because the harm caused by permitting immediate review is greater than the harm created by permitting full review later, we feel that we are justified in drawing the line where we do.

The double jeopardy clause protects a variety of interests; among them a criminal defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." [32] This is an interest which is "wholly unrelated to the propriety of any subsequent conviction." [33] It is an interest in avoiding the rigors and embarrassment of a second trial.[34] However, the defendant's interest in avoiding the rigors of a second trial is *not absolute*. For example, his interest in this regard can be overridden by society's interest in seeing that the prosecution has at least "one complete opportunity to convict those who have violated its laws." [35] Thus, a judge may discharge a hung jury and require the defendant to submit to a second trial without violating

---

[32] *United States v. Scott*, 437 U.S. 82, 92 (1978).

[33] *Abney*, 431 U.S. at 661.

[34] *Id.* at 661-62.

[35] *Arizona v. Washington*, 434 U.S. 497, 509 (1978).

the Double Jeopardy Clause.[36] Similarly, it seems logical to conclude that Congress, in adopting the section 1291 finality requirement, determined that society's interest in avoiding the disruptions caused by interlocutory appeals involving the sufficiency of the evidence [37] outweighed the defendant's interest in ensuring that his less-than-absolute right would not be infringed without appellate review.

However, the double jeopardy clause also protects interests which are more absolute. These include the defendant's interest in avoiding an erroneous conviction. In this respect the double jeopardy clause prevents the prosecution "from honing its trial strategies and *perfecting its evidence through successive attempts at conviction.*" [38] This prohibition seems to be absolute because it lies "at the core of the Clause's protections." [39] In light of the

---

[36] *Keerl v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)).

[37] The delay caused by appellate review of a claim based on the sufficiency of the evidence could be extreme since the entire trial record would have to be reviewed before a decision could be made. Such delays are especially undesirable in criminal proceedings. *See Dibella v. United States*, 369 U.S. 121, 126 (1962) ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("encouragement of delay is fatal to the vindication of the criminal law).

[38] *Tibbs*, 102 S.Ct. at 2218.

[39] *Id.* If a defendant is unnecessarily required to go through a second trial his injury is the resultant "embarrassment, expense . . . ordeal, [and] continuing state of anxiety and insecurity." *Abney*, 431 U.S. at 661-62 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). On the other hand, if the defendant is unjustifiably *convicted* at the second trial the injury increases in magnitude because he is then subject to the punishment prescribed for the crime. The Supreme Court long ago observed that "[i]t is the *punish-*

above, and in light of the Supreme Court's opinion in *Burks v. United States*,[40] it appears that the double jeopardy clause is violated if the government has a full and fair opportunity to convict a defendant, fails to produce enough evidence to sustain its constitutional burden to present legally sufficient evidence, and is then given another opportunity to obtain a conviction. The possibility that this constitutional violation would occur would increase if we eliminated Richardson's right to appellate review of the sufficiency issue because only one (the trial) court would be evaluating the sufficiency of the evidence produced at the first trial. We find no societal interest which justifies this infringement on Richardson's rights.

As noted above, it cannot be argued that the double jeopardy clause requires the appellate court to review Richardson's insufficiency claim after the second trial.[41] But at the same time, while it seems logical to conclude that the need to avoid the disruptions caused by interlocutory appeals in criminal cases justifies *postponing* review of Richardson's insufficiency claim (thereby increasing the possibility that Richardson's less-than-absolute interest in avoiding the rigors of a second trial will be infringed), we refuse to believe, at least in the absence of clear evidence to the contrary, that Congress intended to *preclude* review of that issue when the result would have been to increase the likelihood that Richardson's absolute right to avoid an unconstitutional conviction would be violated.

---

*ment* that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874). Thus, it appears that while the defendant's interest in avoiding the rigors of the second trial may not be absolute (*see supra*, text at notes 32-37), his interest in avoiding an unconstitutional conviction is.

[40] 437 U.S. 1 (1978).

[41] *See supra*, text at note 6.

Therefore, having rejected the other available alternatives and having satisfied ourselves that the interpretation we adopt is consistent with the Supreme Court's application of the *Cohen* exception in *Abney*, we conclude that Richardson cannot appeal the trial court's ruling on his insufficiency and double jeopardy claims until a final judgment is entered against him.

## III. Conclusion

Richardson presents us with an appeal from the trial court's denial of two motions based on his argument that the evidence presented against him at his criminal trial was insufficient. This appeal, however, comes before a final judgment has been entered against him. Because a review of the issue at the base of the claims would undermine the policy behind the finality requirement of section 1291, we hold that we cannot review those claims at this time, realizing full well that the trial court may have erred in its rulings and that as a result Richardson may be required to bear the rigors of an unnecessary second trial. As the Supreme Court has noted:

> Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.[42]

Accordingly, Richardson's appeal is dismissed.

*It is so ordered.*

---

[42] *Cobbledick v. United States*, 309 U.S. 323, 325-26 (1940).

SCALIA, *Circuit Judge, dissenting*: The majority opinion recognizes a double jeopardy right following upon a trial that results in a hung jury, but denies appellate vindication of that right until after the second trial has resulted in a conviction. It thus produces a result that will bring the criminal law process into greater public disrepute than the exclusionary rule, while at the same time doing criminal defendants an evident injustice. The exclusionary rule ordinarily does its work before a verdict of guilty has been pronounced; the community may strongly suspect that the acquitted or discharged defendant should not be walking the streets, but will never know for sure. The double jeopardy rule announced today, by contrast, assures that only *after* the defendant has been publicly proclaimed guilty beyond a reasonable doubt will he be set free. This highly visible compromise of the public safety is counterbalanced by a disregard of the announced rights of the defendant. He is told that he has a constitutional right not to be tried twice for the same offense, which can be vindicated only after he has been tried twice for the same offense. I cannot support the analysis that produces these evenhandedly offensive results. In my view, the majority opinion is mistaken both in its holding that an appeal will not now lie, and in its dictum that an appeal upon final conviction can succeed. I discuss each of these in turn.

## I. JURISDICTION

Central to the jurisdictional issue is the Supreme Court's decision in *Abney v. United States*, 431 U.S. 651 (1977). This held, contrary to prior case law,[1] that trial court denial of a motion to dismiss an indictment on double jeopardy grounds is a "final decision" within the

---

[1] *See, e.g.*, Bryan v. United States, 338 U.S. 552 (1950).

meaning of 28 U.S.C. § 1291.[2] The Court reasoned that although the denial of such a motion is not "final" in the sense that it terminates the proceeding, it falls within the "collateral order" exception to the final judgment rule, first recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and thus is immediately appealable.

The specific violation of the double jeopardy clause alleged in *Abney* was the impending retrial of the defendant following an appellate reversal of his prior conviction because of improperly admitted evidence. The Court's language and reasoning on the jurisdictional point, however, apply to all double jeopardy claims, as the following excerpts demonstrate:

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that *Cohen* has placed beyond the confines of the final-judgment rule.

431 U.S. at 659 (footnote omitted).

> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged.

*Ibid.*

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be sig-

---

[2] Section 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

> nificantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.

431 U.S. at 660.[3]

The majority's attempt to avoid the effect of *Abney* rests upon the *ipse dixit* that "Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency of the evidence ruling is overturned." Maj. Op. at 8. Strictly speaking—and as a matter of fact, as opposed to legal fiction—that is of course not true. A double jeopardy claim exists when the defendant claims double jeopardy—and the assertedly inseverable connection of that claim with an unappealable earlier order goes *at most* to the validity, rather than the existence, of the claim. I assume what the majority means, then, is that no double jeopardy *right* (*i.e.*, no *valid* claim) exists unless the sufficiency-of-evidence ruling is overturned. Before examining the truth of this assertion, I may note that, even if it were correct, the result it would produce is dismissal of the present appeal on the merits, rather than on jurisdictional grounds. In *Abney* itself the Court found—*after* its assertion of jurisdiction—that no double

---

[3] The only language in the opinion conceivably subject to the interpretation that not all double jeopardy claims are covered is the following:

> We therefore hold that pretrial orders rejecting claims of former jeopardy, *such as that presently before us*, constitute "final decisions" and thus satisfy the jurisdictional prerequisites of § 1291.

431 U.S. at 662 (footnote omitted, emphasis added). It is possible to interpret the italicized phrase as one of limitation —meaning that *only* claims of former jeopardy "such as that presently before us" come within the newly enunciated rule. However, the phrase is properly regarded not as limiting but as descriptive—the equivalent of "for example, that presently before us." The latter interpretation is the more plausible, not only because of the other language in the opinion but also because of the commas separating the phrase, which would be inappropriate for the limiting usage.

jeopardy right existed; and the opinion envisions the entertaining of double jeopardy appeals where nonexistence of the right is so clear that the claim is "frivolous."[4] The Supreme Court was saying what I have said above: that if the appellant claims double jeopardy he has made a double jeopardy claim, no matter how unmeritorious it may be. (Of course, no more time or effort is involved in dismissing a frivolous appeal on the merits than on jurisdictional grounds.)

But regardless of whether it should lead to dismissal for lack of jurisdiction (as the majority asserts) or dismissal on the merits, let me address the substance of the proposition that the double jeopardy right "exists . . . *only* if the . . . sufficiency of the evidence ruling is overturned." Such a principle is, of course, neither a statement of fact nor a requirement of logic. It would be entirely possible to grant appellant's motion to bar retrial while letting the sufficiency-of-evidence ruling at the first trial stand—just as federal district courts find it possible to grant habeas corpus petitions despite the existence of contradictory state court judgments that they do not formally "overturn." It is not true that "Richardson's double jeopardy claim is premised entirely on the assump-

---

[4] The Court said:

> Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

431 U.S. at 662 n.8. This same quotation refutes the Fourth Circuit's attempt to distinguish *Abney* on the ground (which is really only a more explicit expression of what the majority has done here) that "*Abney* limited review to colorable double jeopardy claims." United States v. Ellis, 646 F.2d 132, 134 (4th Cir. 1981).

tion that the trial court's ruling on the sufficiency issue was erroneous," Maj. Op. at 8, at least not true in the only relevant sense, which implies that the one is entirely dependent upon the other. The appellant's claim (or right) may logically require the conclusion that the trial court was wrong, but it is based upon nothing except the prosecution's failure, as a matter of fact—*whatever* the trial court may have said—to produce enough evidence to go to the jury.

To say that the principle that the double jeopardy right exists only if the sufficiency-of-evidence ruling is overturned is neither an observable fact nor a logical imperative is not, of course, necessarily to deprive it of an honorable place in the law-books. *Ipse dixits* starker than this shape the concepts and categories that channel legal thought, permit generalized and hence efficient disposition of cases, assure equality of treatment, and check judicial arbitrariness. I am no foe of conceptualism. But the one indispensable condition for the creation of such intellectual constructs is that they appear likely to produce just results. Thus, one may properly employ the analytic conceit here under discussion—that the double jeopardy right "exists . . . *only* if the sufficiency of the evidence ruling is overturned"—or the similar conceit adopted by the Fifth Circuit in *United States v. Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981)—that the double jeopardy claim and the objection to denial of motion to acquit (like the old common-law husband and wife) are one (the husband, in this case, being the latter)—if the predictable consequences of those devices are good. If the consequences are bad, then a different conceit (for example, that the double jeopardy claim is the husband) or even a resort to legal realism would be preferable. And that is the nub of my disagreement. I can understand why one might perform intellectual gymnastics of this sort to *avoid* the results which the majority opinion produces—but surely not to *achieve* them. Why would one, with malice aforethought, place

appellate courts in the position where they can only vindicate constitutional rights by awaiting proof positive that the person they set free is guilty? Or why subject a defendant to a second trial and a public conviction before permitting appellate courts to pronounce that he should not have been tried twice?

The only answer to these questions contained in the majority opinion—and, concurrently, its only pragmatic basis for distinguishing *Abney*—is the threat of " 'leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.' " Maj. Op. at 10, quoting from *DiBella v. United States*, 369 U.S. 121, 124 (1962). In my view, this is well outweighed by the dual threat of destroying public confidence in the judicial criminal process, and of denying the defendant effective vindication of a constitutional guarantee. This appeal has not been taken, after all, in the midst of an ongoing trial, but during an interlude that has already occurred, requiring the selection and empanelling of a new jury. Not infrequently, such interludes are in any event protracted. *See, e.g., United States v. Sanford*, 429 U.S. 14 (1976) (four months); *United States v. Ellis*, *supra* note 4 (three to five months). In this regard a double jeopardy claim that is "given life," *see* Maj. Op. at 11, by a determination at a prior trial is not much different from one that is fathered by a determination in a prior appeal, as in *Abney*. They both slow up the process at a stage in which it has already been interrupted. And they are both worth the delay.

I would find, therefore, that we have jurisdiction to entertain the present appeal, a disposition supported by the Third Circuit's decision in *United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982).[5]

---

[5] *McQuilkin* was foreshadowed by the same circuit's decision in *United States v. United States Gypsum Co.*, 600 F.2d 414 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979). There, defendants' convictions had been reversed on appeal without

## II. Merits of the Double Jeopardy Claim

I turn, then, to the merits of appellant's double jeopardy claim.* Much of the case law concerning double jeopardy involves the question when jeopardy attaches. *See, e.g., Crist v. Bretz*, 437 U.S. 28 (1978). The present appeal may be regarded as raising essentially the converse issue: When does the first jeopardy *cease*, so that subsequent proceedings constitute a *second* attempt at defendant's "life or limb"? The Government asserts the traditional rule that the discharge of a jury for failure to reach a verdict does not, so to speak, terminate the original jeopardy, so that further proceedings on the same charge may be had. *See Arizona v. Washington*, 434 U.S. 497 (1978); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). Appellant asserts that this traditional rule has been changed by *Burks v. United States*, 437 U.S. 1 (1978); *accord, Hudson v. Louisiana*, 450 U.S. 40 (1981), which he correctly describes as "[lying] at the nerve-center" of his case. Brief for Appellant at 31. In effect, he contends that the teaching of *Burks* is that a hung jury following the prosecution's failure to produce legally sufficient evidence terminates the original jeopardy, so that further prosecution for the same offense is barred. The majority opinion, while not allowing immediate appellate vindication of the alleged right, essentially accepts appellant's argument, although it is not as frank in acknowledging that the asserted right is a recent creation of *Burks*, and instead

---

consideration of evidentiary sufficiency, and the case remanded. Prior to retrial, defendants moved for acquittal on the grounds of insufficient evidence at their first trial. The Third Circuit permitted appeal from denial of this motion because, it said, double jeopardy principles would prohibit retrial if the evidence at the first trial was insufficient.

* The Double Jeopardy Clause of the Fifth Amendment reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

portrays it as an obvious and inevitable application of the double jeopardy clause—despite the absence of a single pre-*Burks* holding to support it.

In *Burks*, the court of appeals had overturned a jury conviction on the basis of insufficiency of the evidence. Instead of terminating the case, however, it had remanded, leaving it to the trial court to decide whether a directed verdict of acquittal should be entered or a new trial ordered. The Supreme Court found the remand to be in error, and held that the Double Jeopardy Clause required the court of appeals to direct a judgment of acquittal. Appellant and the majority interpret *Burks* to mean that the failure of the prosecution to produce sufficient evidence gives rise to a double jeopardy right at the conclusion of the first trial. I think, to the contrary, that *Burks* stands for the proposition that a *determination of insufficiency*, whether made by the trial court or by an appellate court, brings the original jeopardy to an end and prevents further prosecution. The difference is obviously significant.

The former position finds support in the following passage from *Burks*:

> The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court. . . .
>
> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an

> individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."

437 U.S. at 11 (citations and footnote omitted). The argument based upon this language is as follows: If *Burks* is to achieve the objective of denying the prosecution "another opportunity to supply evidence which it failed to muster in the first proceeding," it must be applied in such fashion that any failure of proof by the government—whether resulting in an acquittal, a hung jury, or a conviction reversed on appeal—bars retrial. To put the point in the conceptual framework I described earlier, it is necessary to consider the declaration of mistrial rather than the appellate finding of inadequacy as the event terminating the original jeopardy. Several cases have taken this view.[7]

There are many indications, however, that this was not the Supreme Court's intent, and that the above quoted expression of broad desiderata which the holding of *Burks* at least partially pursues was not meant to imply approval of all means necessary to reach the stated ends. There is, to begin with, the rest of the *Burks* opinion itself, which consistently focuses not upon the failure of proof in the trial court, which appellant and the majority opinion consider central, but upon the adjudgment of failure of proof by the court of appeals:

> By implication, [petitioner] argues, the appellate reversal was the operative equivalent of a district court's judgment of acquittal . . . . Therefore, he

---

[7] *United States v. McQuilkin, supra; United States v. Bodey*, 607 F.2d 265 (9th Cir. 1979). The court in the former case, after reviewing the evidence presented at the first trial, found it adequate, and sustained the conviction; thus, a rigorous definition of holding would consign its statements on the double jeopardy issue to *obiter dictum*. *Bodey*, however, actually reverses the conviction, and so squarely holds that the double jeopardy defense lies, citing *Burks*, but without analysis.

> maintains, it makes no difference that the determination of evidentiary insufficiency was made by a *reviewing* court since the double jeopardy considerations are the same, regardless of which court decides that a judgment of acquittal is in order.

437 U.S. at 5-6 (emphasis in original).

> [I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient . . . .

*Id.* at 11 (emphasis in original).

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.

*Id.* at 15.

> The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by the jury is quite limited.

*Id.* at 16. Indeed, the *Burks* opinion's summary of its own holding is as follows:

> Since we hold today that the Double Jeopardy Clause precludes a second trial *once the reviewing court has found the evidence legally insufficient*, the only "just" remedy available for that court is the direction of a judgment of acquittal.

*Id.* at 18 (emphasis added). In short, when the opinion is considered in full, it is eminently clear that the Court did not intend to change prior law governing new trials, as appellant suggests, but merely to extend or clarify the well-established principle that an acquittal—even an erroneous acquittal [8]—bars retrial. *Burks* only establishes

---

[8] *See, e.g.*, Fong Foo v. United States, 369 U.S. 141 (1962).

that an appellate finding of inadequate proof is the equivalent of an acquittal.

This reading of *Burks* is confirmed by the Court's opinion in the very next case in the same volume of the United States Reports, *Greene v. Massey*, 437 U.S. 19 (1978), the first case to apply the new *Burks* learning. *Greene* involved a state conviction which had been obtained in a retrial after the first conviction was set aside by the Florida Supreme Court. The defendant's double jeopardy claim was presented in a federal habeas corpus petition. The federal court of appeals affirmed the district court's dismissal of the petition on the basis—suggested in prior cases but conclusively rejected in *Burks*—that defendant's motion for a new trial barred a subsequent double jeopardy claim. The Supreme Court noted that, in light of *Burks*, this was obvious error if the Florida Supreme Court's reversal of the original conviction was in fact based upon insufficiency of evidence. Because the Court found some ambiguity in the grounds for reversal, it disposed of the case as follows:

> Given the varying interpretations that can be placed on the actions of the several Florida appellate courts, we conclude that this case should be remanded to the Court of Appeals for reconsideration in light of this opinion and *Burks v. United States*, *ante*, p. 1. The Court of Appeals will be free to direct further proceedings in the District Court or to certify unresolved questions of state law to the Florida Supreme Court.

437 U.S. at 26-27 (footnote and citations omitted). For present purposes, the significance of the opinion is this: If *Burks* meant what appellant and the majority opinion here claim, then in *Greene*, decided the same day, the Supreme Court would surely have displayed some interest—and would have instructed the court of appeals to display some interest—not merely in whether the Florida state courts *found* that the evidence in the first trial was inadequate, but also in whether, regardless of what the

Florida courts found, the evidence was *in fact* inadequate.[9] There is no hint of such concern.

Finally, and perhaps most importantly, rejection of appellant's and the majority's expansive interpretation of *Burks* is warranted because of the significant practical consequences that would result from its adoption. As set forth in the first part of this opinion, I think it clear that the double jeopardy claim is immediately reviewable and the right immediately assertable. Thus, neither lack of jurisdiction nor lack of ripeness can ward off the result which caused such concern to the *Becton* and *Ellis* courts —effective reversal of the longstanding rule that the denial of a motion to acquit is not reviewable until conviction is obtained. Every hung jury would entitle the defendant to an immediate appellate determination of the sufficiency of the evidence. Moreover, even if the majority's elegantly constructed jurisdictional theory were to stand the test of time and the force of public outcry, it would still not prevent two other severe consequences of the new double jeopardy right that the majority creates: Where the alleged § 1291 bar to immediate review does not exist, the inadequacy-of-evidence claim must be entertained—so that appellate courts would no longer be able to reverse convictions and remand on the basis of procedural error alone, without entertaining and determining challenges to the sufficiency of the evidence. *See United States v. Marolda*, 648 F.2d 623 (9th Cir. 1981) (*"Marolda II"*).[10]

---

[9] It is clear that federal courts on *habeas corpus* petitions must review the adequacy of evidence where essential to the validity of ultimate conviction. Moore v. Duckworth, 443 U.S. 713 (1979); Jackson v. Virginia, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979).

[10] *Marolda* holds that, even where a conviction has been set aside for procedural error alone, the double jeopardy bar still applies if the evidence at the first trial was insufficient. As a practical matter, this means that the appellate court must always consider the sufficiency-of-evidence issue, even when it reverses on other grounds. Otherwise, the only effect of the remand will be to require a second appeal after the

And such accelerated determination of evidentiary adequacy by state courts (assuming, what will be discussed more specifically below, that acceleration is all that is involved) will trigger accelerated federal court review of the same issue, through *habeas corpus* petitions by defendants awaiting retrial in physical custody or released on bail. *See Delk v. Atkinson*, 665 F.2d 90 (6th Cir. 1981). I have stated earlier that the mere occurrence of such untoward results will not justify the erection of what seem to me contrived obstacles to the defendant's assertion of his double jeopardy rights. It does justify, however, the refusal to create double jeopardy rights hitherto unheard-of.

---

defendant's double jeopardy claim is rejected by the district court that denied his motion for acquittal at the original trial. This is precisely what happened in *Marolda*, where the Ninth Circuit failed to consider the sufficiency issue in the first appeal. *See* United States v. Marolda, 615 F.2d 867 (9th Cir. 1980) (*"Marolda I"*). The holding in *Marolda II* was based upon, and is the logical consequence of, the Ninth Circuit's acceptance of the expansive interpretation of *Burks*, *see* United States v. Bodey, 607 F.2d 265 (9th Cir. 1979) (*"Bodey II"*). That court has sought to create an exception to this logical consequence for the large class of procedural reversals based upon improper admission of evidence. It has reasoned that the adequacy of the remaining evidence, after exclusion of the improperly admitted portion, need not be evaluated since, had the improperly admitted portion been excluded at the outset, the prosecution might have produced additional proof. *See* United States v. Harmon, 632 F.2d 812, 814 (9th Cir. 1980). That speculation hardly seems likely to be so generally true that it would justify such an across-the-board exception.

*Harmon* is incorrect, by the way, in reading footnote 9 of *Greene v. Massey*, *supra*, 437 U.S. at 26, as reserving the question whether, in reversing a conviction for improper admission of evidence, a court must also review the adequacy of the remaining evidence. Rather, it reserved the question whether, *if* the reviewing court chooses to examine the remaining evidence *and finds it insufficient*, the Double Jeopardy Clause bars retrial. To the same effect as *Harmon* is Delk v. Atkinson, 665 F.2d 90, 93 n.1 (6th Cir. 1981).

Moreover, it may well be that mere acceleration of review that would otherwise be accorded at a later date is not all that is involved. Those cases which reject appeals of the present sort, both pre- and post-*Burks*, on the ground of lack of jurisdiction make their task easy by assuming so. They assert that, after all, the issue of insufficiency of the evidence in the first trial can always be raised if and when a conviction in a later trial is finally obtained, since the denial of the motion to dismiss will then be final and reviewable. *See United States v. Rey*, 641 F.2d 222, 225 (5th Cir.), *cert. denied*, 454 U.S. 861 (1981); *United States v. Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981); *United States v. Young*, 544 F.2d 415, 418 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *United States v. Kaufman*, 311 F.2d 695, 698-99 (2d Cir. 1963); *Northern v. United States*, 300 F.2d 131, 132 (6th Cir. 1962). If, however, these dicta are an accurate reflection of the law, the paucity of direct holdings to support the point is remarkable.

I have found only four cases that involve an assertion, after conviction, that the evidence presented to an earlier hung jury was legally insufficient. The only one of them that was decided pre-*Burks* declined to entertain the assertion, stating that it was enough that the government had sustained its burden in the new trial. *United States v. Bodey*, 547 F.2d 1383 (9th Cir.), *cert. denied*, 431 U.S. 932 (1977) ("*Bodey I*"). All three of the cases that entertain the assertion are post-*Burks* and rely upon or at least assume the existence of a double jeopardy ground for appeal. *United States v. Balano*, 618 F.2d 624 (10th Cir.), *cert. denied*, 449 U.S. 840 (1980); *United States v. Bodey*, 607 F.2d 265 (9th Cir. 1979) ("*Bodey II*"); *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979). The only one which, on reviewing the evidence in the prior trial, actually finds it inadequate and reverses the conviction, does so explicitly on the basis of *Burks*, reversing its prior holding in the same case that only the sufficiency of

evidence in the new trial is relevant. *Bodey II, supra.*[11] Before *Burks*, both the cases and the commentators contain such statements as "When a jury fail to agree on a verdict . . . the whole proceeding is nullified, and nothing remains which can benefit accused," 22 C.J.S. *Criminal Law* § 260 at 681 (1961); "'In legal effect a mistrial is equivalent to no trial at all,'" *Powell v. State*, 37 Ala. App. 192, 193, 65 So. 2d 718, 719 (Ala. Ct. App. 1953) (quoting from 58 C.J.S. *Mistrial* at 834 (1948)).

Such an approach—denying not only a constitutional double jeopardy claim but even a statutory right to appeal insufficiency of the evidence at an earlier trial—does not threaten to produce an inequitable criminal justice system in the future any more than it has in the several hundred years past. The majority's concern over giving the prosecution "two bites at the apple"—enabling the government to learn the strengths and weaknesses of the defendant's case in the first trial—is not uniquely applicable to insufficiency-of-evidence cases. The same effect is produced by the prosecution's introduction of inadmissible evidence, producing a conviction that must thereafter be reversed, or by its proposal of erroneous instructions leading to the same result; yet it is not asserted that in such

---

[11] There is a similar dearth of authority concerning the same issue in the civil context. I have found only one case entertaining the allegation that a judgment for plaintiff should be set aside because the evidence introduced at the first trial, which resulted in a hung jury, was inadequate. On the merits, the allegation was rejected. *See* McFall v. Tooke, 308 F.2d 617 (6th Cir. 1962). As late as 1963 (and apparently before *McFall* was in the Federal Reports), the Second Circuit noted the same absence of authority. *See* Basciano v. Reinecke, 313 F.2d 542-43 (2d Cir. 1963). In the civil field as in the criminal, however, opinions denying interlocutory review of the adequacy of the evidence after hung juries are wont to justify their denial by asserting that the issue may later be raised if plaintiff ultimately prevails. *See, e.g.*, Ford Motor Co. v. Busam Motor Sales, 185 F.2d 531, 534 (6th Cir. 1950); Dostal v. Baltimore & Ohio R.R., 170 F.2d 116 (3d Cir. 1948).

cases a conviction in the second trial must be set aside. In fact, from the point of view of overall impact upon the system of criminal justice, prosecutorial error in failing to produce sufficient evidence is *less* demanding of the massive sanction of invalidating a subsequent conviction. That error invariably carries its *own* severe penalty—the extremely high risk that either the trial judge will dismiss the indictment or the jury will acquit, thereby barring further prosecution. Thus, it is not only true that the majority's disposition will (as noted at the outset) more certainly release the guilty than does the exclusionary rule; but it will do so with less reason, since there is no need to deter intentionally feeble prosecutions as there is to deter intentional violations of Fourth or Fifth Amendment rights.

* * * *

In sum, the position adopted by the majority—that a double jeopardy right ultimately exists, but a double jeopardy claim may not now be asserted—seems to me wrong on both counts. While the holding of the opinion (rejection of an immediate appeal) appears to preserve the traditional balance between the rights of the accused and the public safety needs of the society, its dictum continues the erosion of the latter which has been characteristic of the past two decades. It acknowledges the right of a guilty and convicted defendant to go free if an examination of the evidence at his first trial shows that a motion to dismiss should have been granted. Perhaps that should be the law; but there is no evidence that it has ever been either the law or (worse still, what the majority would make it) the Constitution. And because the even-handedly offensive consequences of the majority's jurisdictional holding render it most unlikely that that obstacle to immediate appeal will long endure, the opinion foreshadows a regime in which criminal cases resulting in hung juries will routinely be appealed for sufficiency-of-evidence review.

For these reasons, I would find jurisdiction to entertain the present appeal and would affirm on the merits.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2029 September Term, 1982

United States of America

v.



Robert D. H. Richardson,
Appellant

Criminal No. 81-00104
ARGUED 10-4-82

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

ORDER

On consideration of appellant's petition for rehearing, filed April 5, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

*Per Curiam*

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 81-2029 September Term, 1982

United States of America

v.

Robert D. H. Richardson,

Appellant

Criminal No. 81-00104

ARGUED 10-4-82

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.



*Per Curiam*

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Ginsburg and Scalia would grant the suggestion for rehearing *en banc*.

No. 82-2113

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## SUPPLEMENTAL BRIEF FOR PETITIONER IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

August 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-2113

---

ROBERT D. H. RICHARDSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

## SUPPLEMENTAL BRIEF FOR PETITIONER IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

---

Since the filing of the petition herein, we have discovered the case of *United States v. Sneed,* 705 F.2d 745 (1983), which substantially adds to the confusion in the circuits over the Question Presented.

Sneed's conviction was reversed because of errors in the jury selection at his trial and an insufficiency of the evidence claim was not addressed by the court of appeals. On remand to the district court, he urged that retrial was barred by double jeopardy considerations because the evidence at the first trial was insufficient to support his conviction.

He subsequently filed an interlocutory appeal from the denial of his motion which was entertained and reversed by the Fifth Circuit. The court noted that this was strictly

a double jeopardy appeal, totally isolated from Sneed's first appeal. "We could not, and do not, now reconsider our refusal to address the [insufficiency] issue." In finding appellate jurisdiction the court relied upon *Abney v. United States,* 431 U.S. 651 (1977), and felt unrestained by *United States v. Becton,* 632 F.2d 1294 (5th Cir. 1980) and *United States v. Rey,* 641 F.2d 222 (5th Cir. 1981). In sounding the death knell of those latter two cases, the court distinguished them on the theory that they were really cases seeking review of motions to acquit disguised as double jeopardy claims, while Sneed made a "straight forward double jeopardy claim." 705 F.2d at 747. A distinction, we submit, without a difference. *Sneed* and the instant case were in precisely the same posture at the time their double jeopardy claims were pressed on appeal, *i.e.,* a transcript existed of the completed trials and neither a conviction nor an acquittal obtained.

In apparently veering away from *Becton and Rey,*[1] the court observed in footnote 4: "The Third Circuit has criticized the reasoning of both cases: '[Rey and Becton] failed to recognize the defendants' double jeopardy rights by the simple expedient of recharacterizing the nature of their claims . . .' *United States v. McQuilkin,* 173 F.2d 686 n. 7 (3d Cir. 1982)"

---

[1]A result foreshadowed by Judge Scalia dissenting herein, who believed that the jurisdictional holding was so flawed that it was "most unlikely that the obstacle to immediate appeal will long endure. . . ." (App. A, p. 31a.)

It seems clear that there presently exists a conflict in the Question Presented not only between the Circuits but also within the Fifth Circuit, requiring its resolution at this time.

Respectfully submitted

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

August 1983

No. 82-2113

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

ROBERT D.H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

## JOINT APPENDIX

---

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

*Counsel for Respondent*
United States of America

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
Robert D.H. Richardson

**Petition for Certiorari Filed June 27, 1983**
**Certiorari Granted October 11, 1983**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

---

ROBERT D.H. RICHARDSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

## TABLE OF CONTENTS



THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

**DOCKET ENTRIES**

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

---

UNITED STATES OF AMERICA

v

1. LEROY COOPER
also known as "The Barber"

2. ROBERT D.H. RICHARDSON

**Crim. No. 81-104**

DOCKET ENTRIES

| | |
|---|---|
| 03/27/81 | Filed indictment (G.J. Original)<br>Case assigned to JUDGE JOHNSON |
| 03/30/31 | Bench warrant issued (and ordered on 3/27/81. $10,000.00 Surety Bond set.) (MAGISTRATE BURNETT) |
| 04/15/81 | Defendant arrested.<br>Bench warrant returned executed, executed on 04/15/81 (issued on 3/30/81).<br>Defendant's first appearance.<br>Defendant appears with counsel<br>Arraignment held (Counts 1-3)<br>Defendant enters plea of not guilty (Counts 1-3)<br><br>Appearance of attorney PALMER, ALLAN M (praecipe) retained as counsel for deft) |

05/18/81 Status hearing held (discovery not completed, no motions).
Trial date set for 06/22/81 @ 11:00 AM (Counts 1-3) (per. recog.) (Rep: S. Seymour) (JUDGE JOHNSON).

06/15/81 Motion for continuance filed (MOT #1) (deft. motion to continue the trial until the reappearance of Leroy Cooper, a potential witness favorable to the defense. Affidavit of Wesley McCray, Affidavit of Robert D.H. Richardson).

06/22/81 Trial begins - jury (Counts 1-3) (Jurors and 2 alternates sworn)
Trial held - jury (Counts 1-3)
Jury trial adjourned to 06/23/81 @ 9:30 AM (Counts 1-3) (respited, per. recog.) (Rep: S. Seymour) (JUDGE JOHNSON)

06/23/81 Trial held - jury (Counts 1-3) (trial resumes, same jury and 2 alternates)
Motion made in open court for judgment of acquittal (MOT #2) (Counts 1-3) (deft's oral motion for judgment of acquittal or, in the alternative, to sever count 2).
Motion for judgment of acquittal denied (MOT #2) (and to sever count 2) (Dkt'd 06/25/81).
Jury trial adjourned to 06/24/81 @ 9:45 AM (Counts 1-3) (respited, per. recog.) (Rep: S. Seymour (JUDGE JOHNSON).

06/24/81 Trial held - jury (Counts 1-3) (Trial resumes, Juror #1 excused. Alternate #1 takes seat of #1. Jury retires to deliberate.)

Jury trial adjourned to 06/25/81 @ 9:30 AM (Counts 1-3) (Deft. per. recog. (Rep: S. Seymour) (JUDGE JOHNSON)

06/25/81 Trial held - jury (Counts 1-3) (Jury resumes deliberations.) (Dkt'd 06/29/81).

Jury verdict of not guilty (Count 2) (Jury resumes deliberations as to Counts 1 and 3. Jury excused at 4:50 PM)

Jury trial adjourned to 06/26/81 @ 9:00 AM (Counts 1, 3) (Deft. per. recog. (Rep: S. Seymour) (JUDGE JOHNSON)

06/26/81 Trial held - jury (Counts 1, 3) (Jury resumes deliberations. Jury unable to reach a verdict as to Counts 1 and 3. Jury discharged.)

Order mistrial declared (Counts 1, 3) (JUDGE JOHNSON)

Trial date set for 09/14/81 @ 10:00 AM (Counts 1, 3) (Deft. to file motion for judgment of acquittal by 7/2/81 with govt. to respond thereafter, Court will then decide if an oral argument is necessary. Deft. per. recog. (Rep: S. Seymour) (JUDGE JOHNSON).

07/01/81 (MOT #2) (Deft. memorandum in support of oral motion for judgments of acquittal on counts 1 and 3 of the indictment)

07/29/81 Govt. opposition to deft's motion for judgments of Acquittal

08/27/81 Motion filed (MOT #5) (Deft's motion to bar retrial on counts one (1) and three (3) as violative of the double jeopardy provision of the fifth amendment to the United States Constitution)

09/11/81 Order filed denying motion of deft for judgment of acquittal on counts 1 and 3. (N) (JUDGE JOHNSON)

Notice of interlocutory appeal (APPL #1) (from Order dated 9/11/81 denying defts motion for judgment of acquittal on counts 1 and 3.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

UNITED STATES OF AMERICA

v.

ROBERT D.H. RICHARDSON,
*Appellant.*

*No. 81-2029*

**DOCKET ENTRIES**

09/24/81 15- Appellant's suggestion for hearing en banc (p-24)

09/24/81 15- Appellant's brief (m-24)

10-07-81 Clerk's order that subject to action by the Court on the pending suggestion for hearing, en banc, appellant's motion to waive the requirement of Rule 9, General Rules of this Court and to permit the filing of two (2) additional copies of the transcript herein, is granted

10-07-81 2- Additional copies of the transcript

10/16/81 4- Appellee's motion to extend time to file brief to 11/09/81 (m-16)

10/22/81 Clerk's order that appellee's motion to extend time to file brief is granted to November 9, 1981

11/04/81 4- Appellee's motion for leave to file motion to extend time to file brief (m-4)

11/09/81 Clerk's order directing Clerk to file appellee's motion to extend time to file brief and time is extended to and including November 30, 1981

11/09/81 4- Appellee's motion to extend time to file brief (m-4) (filed per above order)

11/30/81 4- Appellee's motion for suspension of briefing schedule (m-30)

11/30/81 4- Appellee's motion to dismiss for lack of jurisdiction (m-30)

12/01/81 Certified Original Supplemental Record with 1 volume of transcript (n-2)

12/07/81 4- Appellant's opposition to appellee's motion to dismiss for lack of jurisdiction (p-7)

12/09/81 4- Appellee's reply to appellant's opposition to appellee's motion to dismiss for lack of jurisdiction (m-9)

12/15/81 Per Curiam order, en banc, that the suggestion for hearing en banc is denied; CJ Robinson; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs

12/15/81 Clerk's order that the time for filing appellee's brief is extended until 10 days after this Court rules on the pending motion to dismiss

02/04/82 Certified Original Supplemental Record containing 1 volume of transcript under 1 cover (n-2)

03/29/82 Per Curiam order that appellee's motion to dismiss is referred to the panel which will hear this case upon completion of briefing. Pursuant to the order entered December 15, 1981, appellee's brief is due within 10 days from the date of this order; Tamm (who did not participate), Ginsburg and Bork, CJs.

04/08/82 4- Appellee's motion for leave to file brief in xerox form, pending printing (m-8)

04/13/82 Clerk's order granting appellee's motion for leave to file brief temporarily in xerox form

04/13/82 1- Appellee's brief (m-8)

04/14/82 15- Appellee's brief (m-14)

04/14/82 15- Appellant's reply brief (p-13)

04/20/82 4- Appellee's motion to reschedule oral argument (m-20)

05/18/82 Clerk's order that the motion of appellee to reschedule argument is granted and argument herein, presently scheduled for 06/04/82, is postponed pending further order of the Court

| | |
|---|---|
| 10/04/82 | ARGUED before Tamm, Wilkey* and Scalia, CJ's. |
| 03/11/83 | Opinion for the Court filed by Circuit Judge Wilkey. |
| 03/11/83 | Dissenting opinion filed by Circuit Judge Scalia. |
| 04/05/83 | 15- Appellant's petition for rehearing and suggestion for rehearing en banc (p-5) |
| 04/27/83 | Per curiam order that appellant's petition for rehearing, filed 04/05/83, is denied; Tamm, Wilkey and Scalia, CJS |
| 04/27/83 | Per curiam order, en banc, that appellant's suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges Ginsburg and Scalia would grant the suggestion for rehearing en banc) |

[March 27, 1981]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | Criminal Case No. |
| | : | No. 81-00104 |
| v. | : | Grand Jury Original |
| | : | 21 U.S.C. 841(a); 21 |
| LEROY COOPER | : | U.S.C. 846 (Distribution |
| also Known as "THE BARBER" | : | of a Controlled Substance; |
| ROBERT D.H. RICHARDSON | : | Conspiracy to Distribute a Controlled Substance) |

The Grand Jury Charges:

COUNT ONE:

THE CONSPIRACY

1. From on or about September 22, 1980, to on or about October 21, 1980, within the District of Columbia, LEROY COOPER, also known as "THE BARBER," and ROBERT D.H. RICHARDSON, the defendants herein, knowingly, and intentionally did combine, conspire, confederate, and agree together to commit offenses against the United States of America in that they conspired together unlawfully to distribute and possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance.

OBJECT

2. It was the object of said conspiracy to make money from the illegal sale of heroin.

## MEANS USED TO ACHIEVE THE OBJECTS OF THE CONSPIRACY

3. Among the means used to achieve the object of the conspiracy were the following:

(a) The defendant LEROY COOPER, also known as "THE BARBER," would and did make himself available at premises including the barbershop at 1812 - 7th Street, N.W., Washington, D.C., as someone to contact if a person wished to purchase illegal heroin;

(b) Having received money from persons wishing to purchase illegal heroin, the defendant LEROY COOPER, also known as "THE BARBER," would and did take the money to the defendant ROBERT D.H. RICHARDSON.

(c) The defendant LEROY COOPER, also known as "THE BARBER," would and did purchase from the defendant ROBERT D.H. RICHARDSON quantities of illegal heroin.

(d) The defendant LEROY COOPER, also known as "THE BARBER," after delivering the heroin purchased, would and did receive payment from the purchaser or the defendant ROBERT D.H. RICHARDSON, or both, for his services in arranging the sale and delivery of the illegally purchased heroin.

## OVERT ACTS

4. In order to further and achieve the object of their conspiracy, the defendants committed the following overt acts:

(a) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," telephoned the defendant

ROBERT D.H. RICHARDSON for the purpose of arranging a sale of heroin.

(b) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," drove to the intersection of 15th and Ives Streets, S.E., Washington, D.C., for the purpose of meeting with the defendant ROBERT D.H. RICHARDSON to complete a heroin transaction.

(c) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," received five thousand dollars ($5,000) for the purpose of purchasing heroin.

(d) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," received from the defendant ROBERT D.H. RICHARDSON 55.780 milligrams of heroin and other substances in exchange for five thousand dollars ($5,000.00).

(e) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," delivered to Special Agent John W. Lee, a Drug Enforcement Administration Agent acting in an undercover capacity, 55,780 milligrams of heroin and other substances.

(f) On or about September 22, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," received from Special Agent John W. Lee, one hundred dollars ($100.00) in payment for delivering the heroin.

(g) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," met with the defendant ROBERT

D.H. RICHARDSON at 1812 - 7th Street, N.W., Washington, D.C., for the purpose of arranging a heroin transaction.

(h) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," drove to the intersection of Georgia Avenue and Newton Streets, N.W., Washington, D.C.

(i) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," received two thousand five hundred dollars ($2,500.00) for the purchase of heroin.

(j) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," drove to the 1500 block of 9th Street, N.W., Washington, D.C.

(k) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," received from the defendant ROBERT D.H. RICHARDSON 34,390 milligrams of heroin and other substances in exchange for two thousand five hundred dollars ($2,500.00).

(l) On or about October 21, 1980, within the District of Columbia, the defendant LEROY COOPER, also known as "THE BARBER," delivered to Special Agent John W. Lee 34,390 milligrams of heroin and other substances.

COUNT TWO;

On or about September 22, 1980, within the District of Columbia, LEROY COOPER, also known as "THE BARBER," and ROBERT D.H. RICHARDSON, did unlawfully, knowingly, and intentionally distribute 55,780

milligrams of heroin and other substances, a Schedule I narcotic drug controlled substance.

COUNT THREE:

On or about October 21, 1980, within the District of Columbia, LEROY COOPER, also known as "THE BARBER," and ROBERT D.H. RICHARDSON did unlawfully, knowingly, and intentionally distribute 34,390 milligrams of heroin and other substances, a Schedule I narcotic drug controlled substance.

A TRUE BILL:

/s/ Joseph T. Thornton Jr.
FOREMAN

/s/ Charles F.C. Ruff/Esq.
CHARLES F.C. RUFF
Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

v. Crim. No. 81-00104

Leroy Cooper a/k/a "The Barber"
Robert D.H. Richardson

#(2) MOTION TO CONTINUE THE TRIAL UNTIL THE REAPPEARANCE OF LEROY COOPER, A POTENTIAL WITNESS FAVORABLE TO THE DEFENSE

In the instant case Mr. Richardson and Leroy Cooper are indicted in three counts alleging a (1) narcotic conspiracy 21 U.S.C. 846 and (2)(3) two counts of distributing a controlled substance 21 U.S.C. 841(a). The distributions allegedly occurred on September 22, 1980 and October 21, 1980. The instant indictment was returned on March 27, 1981 and Mr. Richardson surrendered to authorities on April 15, 1981.

In criminal number 81-00102 Leroy Cooper is indicted in five counts for distribution of narcotic drugs on September 3, 9, 16, 30, 1980 and December 5, 1980. In Criminal Number 81-00103 Leroy Cooper and Larry Wyder are indicted in three counts alleging a narcotic conspiracy and two distributions occurring on August 26 and 28, 1980. A search warrant was executed on Wyder's apartment on August 30, 1980 resulting in his being charged alone in count four with possession of a narcotic drug with intent to distribute it. In all three cases the alleged sales were similar transactions, *i.e.*, hand to hand transfers of drugs from Leroy Cooper to Agent John Lee of the D.E.A.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

v. Crim. No. 81-104

Leroy Cooper
a/k/a "The Barber"
Robert D.H. Richardson

MOTION TO BAR RETRIAL OF DEFENDANT RICHARDSON ON COUNTS ONE AND THREE AS VIOLATIVE OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

As demonstrated in our *Memorandum* and *Reply* in support of Robert D.H. Richardson's Rule 29 motion for judgments of acquittal, the evidence adduced by the Government on the remaining counts is insufficient as a matter of law to support convictions thereon. Accordingly, since the defendant is entitled to judgments of acquittal on those counts, it would be violative of the double jeopardy provision of the Fifth Amendment to the United States Constitution to have him "run the gauntlet" of a second prosecution. *Burks* v. *United States,* 437 U.S. 1, (1978); *Crist* v. *Bretz,* 437 U.S. 28, 34 (1978); *United States* v. *Wiley,* 170 U.S. App. D.C. 382, 517 F.2d 1212 (1975) (n.30).

Accordingly, we respectfully request the Court to bar a second trial on the instant indictment because such trial

would twice place the defendant in jeopardy in violation of the Fifth Amendment.

Respectfully submitted,

Allan M. Palmer
1707 - N Street, N.W.
Washington, D.C. 20036

## CERTIFICATE OF SERVICE

I hereby certify that I have personally served the original and two copies of the instant motion on the office of the Clerk of this Court this 27th day of August 1981.

Allan M. Palmer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| v. | : | Criminal No. 81-104 |
| ROBERT D.H. RICHARDSON | : | |

Upon consideration of defendant's motion for judgment of acquittal on Counts One and Three of the indictment, the opposition thereto, the memoranda of counsel, and the entire record herein, it is this 11th day of September, 1981,

ORDERED that the motion be, and hereby is, DENIED.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| v. | : | Criminal Action No. 81-104 |
| ROBERT D.H. RICHARDSON, | : | |
| Defendant. | : | |

Washington, D.C.
Monday, September 14, 1981

The above-entitled action came on for a status hearing before the Honorable NORMA HOLLOWAY JOHNSON, United States District Judge, in Courtroom No. 4, commencing at approximately 10:00 a.m.

APPEARANCES:

On behalf of the Government:

WILLIAM O'MALLEY, Esquire
Assistant United States Attorney

On behalf of the Defendant:

ALLAN M. PALMER, Esquire
Washington, D.C.

Douglas R. MacQuown, CM
Official Court Reporter

PROCEEDINGS

[Transcript p. 2] THE CLERK: Criminal Case 81-104, Robert D.H. Richardson. Mr. Palmer for the defendant. Mr. O'Malley for the Government.

THE COURT: Good morning, counsel.

MR. O'MALLEY: Good morning, Your Honor.

MR. PALMER: Good morning.

THE COURT: Now I notice you are Mr. Robert Richardson.

THE DEFENDANT: That's right.

THE COURT: All right. Mr. Richardson, you are here with your attorney today. This matter, as you know, was scheduled for trial today, but I noted that on Friday, Mr. Palmer, you appealed my denial of your Motion for Judgment of Acquittal on the grounds of double jeopardy.

MR. PALMER: Yes, Your Honor. Just as a housekeeping matter, the double jeopardy claim, of course, hinged on the ruling of Judgment of Acquittal.

Having denied the Judgment of Acquittal a fortiori, I assume that you also denied the double jeopardy claim.

THE COURT: No question about it.

MR. PALMER: So, just as a matter of record, can it also be indicated that, on September 11th, you also sought and did deny the double jeopardy claim also?

THE COURT: Yes.

* * * *

* * * * *

[Transcript p. 4] [THE COURT]: But it's perfectly all right with me to set a control date, if that's all right with you.

MR. PALMER: Oh yes, Your Honor. We move expeditiously inasmuch as I have already completed the appellate brief in this case and expect it to be filed pretty soon.

So we have agreed on November 16th just as a control date, if that's all right with Your Honor. It's a Monday.

* * * *

## OPINIONS AND JUDGMENTS BELOW

1. Judgment dismissing the appeal Pet. App. 1a-31a.

2. Denial of petition for rehearing Pet. App. 32a.

3. Denial of suggestion for rehearing en banc Pet. App. 33a.

No. 82-2113

# In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D.H. RICHARDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

*Department of Justice*
*Washington, D.C.20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Constitution and statutes:

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

ROBERT D. H. RICHARDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

## JURISDICTION

The judgment of the court of appeals was entered on March 11, 1983. A petition for rehearing was denied on April 27, 1983. The petition for a writ of certiorari was filed on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U.S.C. 846, and one count of conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1). At the close of the government's case and immediately before the case was submitted

to the jury, the district court denied petitioner's motion for judgment of acquittal. The jury acquitted petitioner on one of the substantive counts but was unable to reach a verdict on the two remaining counts. The court declared a mistrial and scheduled retrial, whereupon petitioner renewed his motion for judgment of acquittal, and in addition moved to bar retrial on double jeopardy grounds. The district court denied these motions and petitioner appealed. The court of appeals dismissed petitioner's appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The evidence at trial showed that in September and October of 1980, petitioner was the source of two purchases of heroin made by Special DEA Agent John Lee from Leroy Cooper.

On September 21, Agent Lee made arrangements with Cooper to purchase narcotics the next day (I Tr. 29-30). When on September 22 Cooper arrived at the barbershop where he worked, he told Lee he had to go get the package (*id.* at 72). Lee got into Cooper's car and they drove away (*id.* at 30). When the car stopped, Lee gave Cooper $5,000 and Cooper got out of the car (*id.* at 32). In the meantime Lee went to a telephone booth and called his office (*id.* at 32-33). Moments later an agent saw Cooper get out of a dark color Mercury Cougar convertible (*id.* at 123). Cooper returned to the car where Lee was waiting and said his source was curious why Lee had used the telephone (*id.* at 33). Cooper then gave Lee a package containing about two ounces of 31% pure heroin (*id.* at 33-34, 188).

Between September 22 and October 21, Agent Lee made one additional purchase of heroin from Cooper (*id.* at 190). When Lee telephoned Cooper on October 20, Cooper said he knew that Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought on September 22 (*id.* at 190-191).

On October 21, Cooper told Lee that his source would bring the heroin to the shop, which was under video-tape surveillance, as soon as Cooper placed the order (*id.* at 191-192). About a half-hour later, petitioner drove up to the shop in a dark blue Mercury Cougar convertible with the same license tag number as the car involved in the September 22 transaction (II Tr. at 7-8). Petitioner got out of the car, spoke to Cooper, and drove away (*id.* at 8).

When Agent Lee returned to the barbershop, Cooper told him that his source had sensed the presence of police and that they would have to drive to another location (I Tr. 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (*id.* at 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick occupied by Wesley McCray (II Tr. 9-10). After a second change of locations petitioner got out of the Buick and McCray drove the car to the 800 block of P Street, where he met Cooper (I Tr. 280-281). Two or three minutes later Cooper returned to Lee's car and gave Lee a plastic bag containing more than an ounce of 30% pure heroin (*id.* at 189). Petitioner's fingerprint was recovered from the bag (*id.* at 106, 113-114).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter, petitioner unsuccessfully moved for judgment of acquittal and to bar retrial on the ground that the evidence regarding the counts on which the jury was hung had been insufficient to support a conviction. Petitioner appealed from the district court's denial of his motion, and the court of appeals dismissed for want of jurisdiction.

The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial

court's ruling on the sufficiency of the evidence" (Pet. App. 3a). Since the trial court's order was not a final judgment within the strict meaning of 28 U.S.C. 1291, petitioner's insufficiency claim could be reviewed only if it fell within the collateral order exception first recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The court of appeals held (Pet. App. 5a-6a) that the district court's ruling failed to meet the requirements of the *Cohen* exception in two respects. First, the court held that the legal sufficiency of the evidence is "a completely non-collateral issue," since "the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged" (*id.* at 5a). Second, the court found that the right to appellate review of the issue would not be lost if immediate review was denied because respondent could raise the issue when appealing his conviction following his second trial (*id.* at 5a-6a). Hence, the court concluded that petitioner had "failed to make *at this time* any double jeopardy claim which can be reviewed by an appellate court" (Pet. App. 9a) (emphasis in original).[1]

## ARGUMENT

1. Petitioner contends that, under *Abney* v. *United States*, 431 U.S. 651 (1977), and *Burks* v. *United States*, 437 U.S. 1 (1978), he was entitled to immediate appellate review, prior to retrial, of the sufficiency of the prosecution's evidence in his first trial, in order to avoid being placed in double jeopardy. Recognizing that the district

---

[1]Judge Scalia, in dissent, concluded that the court of appeals had jurisdiction under 28 U.S.C. 1291, but that there can be no double jeopardy violation where, as here, no court or jury had found the evidence at the first trial insufficient (Pet. App. 20a). While based on a different rationale, Judge Scalia's view leads to the same conclusion: appellate courts cannot review sufficiency of the evidence claims on interlocutory appeal.

court's order was not final in the sense that it terminated the proceedings, petitioner relies upon the "collateral order" doctrine first recognized in *Cohen* v. *Beneficial Industrial Loan Corp., supra*, as applied in *Abney*.

*Abney* concerned the appealability of a motion to dismiss based on what might be termed pure double jeopardy grounds. The defendants in *Abney* claimed that the jury's verdict in their first trial, reversed on appeal, could be read as an acquittal on charges brought against them in their second trial. The sole issue for the appellate court was the legal effect of the verdict in the first trial on the permissibility of a second trial.

Petitioner would expand the reach of *Abney* to cases involving a mistrial or the grant of a new trial, to permit the interlocutory review of any issue that might have justified a judgment of acquittal in the first trial. Since counsel for the defense ordinarily makes a motion to acquit for insufficiency of the evidence as a matter of course, petitioner's theory would in practice guarantee a right of interlocutory appeal, with attendant delay, in almost every prosecution in which there is a mistrial.[2]

The statutory policy against piecemeal appellate litigation is particularly pertinent to petitioner's claim. Under petitioner's theory, proceedings in the trial court would be postponed for the duration of the appellate court's plenary review — a consequence "especially inimical to the effective and fair administration of the criminal law" (*DiBella* v.

---

[2]If interlocutory appeals were permitted in cases of this kind, the delay introduced in criminal prosecutions would be substantial. In the present case, 22 months already have elapsed since the district court declared a mistrial and set the case for retrial. Still more time will elapse before this Court can act on the petition for certiorari. Petitioner's interlocutory appeal has thus resulted in substantial disruption of the proceedings in the district court.

*United States*, 369 U.S. 121, 126 (1962); see also *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940)). Appellate courts would be required in every case to analyze the elements of the charges against the defendant, sift through the trial transcript, review evidentiary exhibits, and decide whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. Unlike the claim in *Abney* (431 U.S. at 662-663), it would not be possible in most cases involving an insufficiency claim to use summary procedures or to determine the merits of the claim on the basis of the indictments and prior judgments.[3] Under petitioner's theory, appellate judges would delve deeply into the factual intricacies of each case, only to be forced to duplicate the process if the accused is retried and convicted.[4] Appellate courts would be denied the economies and enhanced insight that flow from unitary review of all claims of error in a single proceeding. Petitioner's theory thus runs counter to one of the basic purposes of the final judgment rule — to prevent "an unjustified waste of scarce judicial resources"

---

[3]The decision in *Abney* was predicated in part on the expectation that the problem of dilatory appeals could be "obviated by rules or policies giving such appeals expedited treatment" (431 U.S. at 662 n.8). This expectation may be realistic where the appellant raises a pure double jeopardy claim based on interpretation of a prior judgment, susceptible to rapid appellate review. Where determination of the appellant's claim requires plenary review of the earlier proceeding, the expectation does not hold.

[4]The duplication of effort at the appellate level is doubly a cause for concern since in every instance the trial judge, who is presumptively the most familiar with the charges and evidence in the case, will have already considered and rejected the claim of insufficiency. As this Court has observed, "[p]ermitting piecemeal appeals would undermine the independence of the district judge," since one purpose of the final judgment rule is to "emphasize[] the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial" (*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)).

(*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981); see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)).

*Abney* does not compel the conclusion that a claim of insufficiency of the evidence, however inappropriate for interlocutory review in other contexts, is appealable after a mistrial merely because it is linked to a double jeopardy claim. As this Court said in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978): "[A] federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction." This Court made clear in *Abney* that the double jeopardy claim was appealable because it satisfied the criteria for the "collateral order" exception, as set forth in *Cohen*. The Court carefully considered the *Cohen* factors (431 U.S. at 658-662) and concluded that the order rejecting a claim of double jeopardy satisfied all three. A similar analysis was followed in *MacDonald* (435 U.S. at 856-861), to an opposite conclusion.

As the court of appeals concluded (Pet. App. 5a), the order in this case was not "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*Abney, supra*, 431 U.S. at 659).[5] It is not,

---

[5]We acknowledge that the district court's denial of petitioner's motion to dismiss had the requisite conclusiveness — that it did not leave the issue "open, unfinished, or inconclusive" (*Cohen*, 337 U.S. at 546). Under the apparent compulsion of *Abney's* reasoning, we will also assume, though the court of appeals concluded otherwise (Pet. App. 5a), that the order below "involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment" (*Abney, supra*, 431 U.S. at 658, quoting *Cohen, supra*, 337 U.S. at 546). It is nevertheless worth noting that the reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient would afford the petitioner substantial and valuable relief, even if it does come too late to avoid the retrial itself.

therefore, appealable prior to final judgment.[6] The district court's ruling that the government had presented sufficient evidence to justify a finding of guilt is a classic example of a pretrial order that is "enmeshed in the factual and legal issues" to be resolved during the trial on the merits (*Firestone Tire & Rubber Co.* v. *Risjord, supra*, 449 U.S. at 377). Rather than being "completely independent of [the issue of] guilt or innocence" (*Abney, supra,* 431 U.S. at 660), the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit explained in *United States* v. *Rey*, 641 F.2d 222, 225, cert. denied, 454 U.S. 861 (1981) (quoting *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981)):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

---

[6]The district court's order is also nonappealable for another reason. This Court noted in *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982) slip op. 9-10 that "[a]s an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must 'present[] a serious and unsettled question' " (quoting *Cohen, supra*, 337 U.S. at 547). The insufficiency of the evidence claim in this case is obviously not a "serious and unsettled question" and thus does not justify immediate appellate review.

The decisive character of this prong of the analysis is borne out by *Abney* itself.[7] In addition to its holding on double jeopardy claims, the Court held that a defendant could *not* obtain interlocutory review of a pretrial order sustaining an indictment, even though delaying review could result in putting the accused through the ordeal of an unwarranted trial (*id.* at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.

The court of appeals was therefore correct in rejecting petitioner's argument that the principle of *Abney* should be extended to permit appeal of the district court order.[8] Like a pretrial order sustaining an indictment, the order in this case "goes to the very heart of the issues to be resolved at the upcoming trial."

---

[7]Petitioner relies heavily (Pet. 4-6) on language in the *Abney* opinion stressing that the Double Jeopardy Clause guarantee against being put twice to trial for the same offense would be undermined if the accused were not permitted an appeal before the second trial. But this section of the *Abney* opinion was addressed solely to the third prong of the *Cohen* analysis —whether the decision sought to be reviewed involved an important right which could be "lost, probably irreparably," if review had to await final judgment (*Abney, supra,* 431 U.S. at 658, 660-662). The Court concluded that this requirement was satisfied. Nonetheless, the Court independently considered the remaining *Cohen* factors as well.

[8]This analysis of *Abney* is bolstered by the three court of appeals decisions cited by the Court in support of its holding, (431 U.S. at 657). *United States* v. *Barket*, 530 F.2d 181 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976), like *Abney*, involved the pure double jeopardy issue of the effect of a final judgment in the first trial upon reprosecution on a similar charge in the second trial. *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), and *United States* v. *Lansdown*, 460 F.2d 164 (4th Cir. 1972), involved an issue completely "separable from, and collateral to" the question of guilt or innocence — whether the trial court erroneously caused a mistrial by too hastily declaring the jury

Nor does *Burks* v. *United States* support a contrary conclusion. This Court in *Burks* simply held that an appellate court's finding that prosecution evidence was insufficient to support a conviction is functionally identical to a trial court's finding, and should have the same effect — a judgment of acquittal. A judgment of acquittal, of course, bars retrial under the Double Jeopardy Clause. In the Court's words (437 U.S. at 11; emphasis in original):

> [I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient * * *. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court.

*Burks* did not address the *timing* of appellate review or interpret the final judgment requirement of 28 U.S.C. 1291.[9] It merely established that a finding of insufficiency of the evidence, *whenever it occurs,* constitutes a judgment of acquittal and bars retrial. No such finding has been made by a court in this case.

---

deadlocked. None of these lower court decisions cited by the *Abney* Court involved claims, such as insufficiency of the evidence, that "go[] to the very heart of the issues to be resolved at the upcoming trial" (*Abney, supra,* 431 U.S. at 663). Indeed, in *United States* v. *Lansdown, supra,* 460 F.2d at 171 n.8, the Fourth Circuit carefully distinguished the case from another in which the motion to dismiss on double jeopardy grounds would be more closely intertwined with the merits of the case.

[9]The question of appellate jurisdiction is purely a matter of statutory construction. The Double Jeopardy Clause itself creates no right of appeal. *Abney, supra,* 431 U.S. at 656; see *Heike* v. *United States,* 217 U.S. 423, 428 (1910).

Petitioner is not entitled to an immediate appeal merely because an appellate finding of insufficiency, if it were made now, would have the effect under the Double Jeopardy Clause of sparing him retrial. Rather, this case presents the common, if lamentable, situation in which the accused must bear "the discomfiture and cost of a prosecution" before his claim may properly be "reconsider[ed] by an appellate tribunal." *Cobbledick* v. *United States, supra*, 309 U.S. at 325-326. Every court of appeals that has considered the issue in this procedural context has reached this conclusion, and this Court has denied certiorari in three such cases. *United States* v. *Ellis*, 646 F.2d 132, 134-135 (4th Cir. 1981); *United States* v. *Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981); *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Young*, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

Petitioner asserts (Pet. 3-4), and the court below agreed (Pet. App. 6a-8a), that the Third Circuit's decision in *United States* v. *McQuilkin*, 673 F.2d 681 (3d Cir. 1982), is in conflict with the court of appeals' decision in this case and the other circuit court decisions cited above. However, *McQuilkin* is distinguishable. The defendants in *McQuilkin* were convicted by a magistrate of contempt of an injunctive order. The district court, acting in an appellate capacity, reversed and scheduled a retrial before a jury, while rejecting the defendants' claim that the evidence before the magistrate was insufficient. *McQuilkin*, like *United States* v. *Sneed*, 705 F.2d 745 (5th Cir. 1983), *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981), *United States* v. *Jelsma*, 630 F.2d 778 (10th Cir. 1980), and *United States* v. *United States Gypsum Co.*, 600 F.2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979), thus involved the problem of

the timing of subsequent appeals *after an initial final judgment of conviction has been entered.*[10]

Whatever the merits of these decisions, their impact on judicial economy and the administration of justice is considerably less than would be caused by a right of interlocutory appeal here, where there has been no judgment in the trial court and no involvement by an appellate court in the process. In cases such as *McQuilken* and *Sneed*, the appellate court can minimize the delay and burden by addressing the question of evidentiary sufficiency as part of the first appeal. Compare *Sneed, supra* (second appeal permitted before retrial to consider insufficiency claim), with *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, No. 82-5010 (Nov. 1, 1982) (presuming that appellate court decides insufficiency claim, if raised, on initial appeal). By contrast, a right of appeal in the instant case would interfere with the ability of trial courts to schedule prompt retrials. In addition, the entry of an initial final judgment is of particular significance under the reasoning of *Abney* since the principal issue in double jeopardy cases (*e.g., Tibbs* v. *Florida*, 457 U.S. 31 (1982); *Hudson* v. *Louisiana*, 450 U.S. 40 (1981); *Greene* v. *Massey*, 437 U.S. 19 (1978); *Abney* v. *United States, supra*) is the effect of an earlier *judgment* on the permissibility of retrial.

In sum, while the aforementioned decisions may give reason to anticipate that a conflict among the circuits on the issue presented by this case may some day emerge, no such

---

[10]We do not contend that the *reasoning* of these decisions is consistent with that of the court of appeals in the instant case, but that the *holdings* create no conflict. Indeed, as is apparent from the *Sneed* opinion's treatment of the *Becton* and *Rey* decisions (705 F.2d at 747), these two lines of cases have been able to coexist in the Fifth Circuit.

conflict now exists, and there is accordingly no need for review by this Court at the present time.[11]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

AUGUST 1983

---

[11]If this Court were to grant review, it presumably would limit its consideration of the case to the appealability issue. If it then found the evidentiary sufficiency claim to be appealable, we assume it would remand to the court of appeals to consider the merits of that claim, which presents no issue independently worthy of this Court's consideration at the present time. We accordingly do not address the merits of the sufficiency issue, although we note our belief that this issue was correctly decided by the district court.

DOJ-1983-08

No. 82-2113

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY BRIEF FOR PETITIONER

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

September, 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-2113

---

ROBERT D. H. RICHARDSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

## REPLY BRIEF FOR PETITIONER

---

The Petition herein has gained added impetus from an unforeseen ally – the government's Brief In Opposition. At note 5 thereof (Br. 7) appears the concession that if petitioner were convicted at a retrial, such conviction must be reversed if "the evidence at the first trial was legally insufficient. . . ." The government thus fully supports our argument that, in the circumstances presented, the second trial would itself be improper because it would violate petitioner's constitutional right not to be twice placed in jeopardy. The remedy advanced to ameliorate this error, however, *i.e.*, reversal of the conviction, is precisely the remedy previously rejected by this Court.

> "[E]ven if the accused is . . . convicted [and] has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to en-

> dure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States,* 431 U.S. 651, 662 (1977)

Respondent also alleges that the summary procedures to weed out frivolous appeals suggested by *Abney* could not be utilized in cases such as the one at bar (Br. 6) because of their complexity. In support of this argument respondent has engendered a concept previously unknown to the law, *i.e,* "pure double jeopardy" claims (Br. 5, line 6; n. 3 Br. 6; n. 8 Br. 9), as opposed to impure double jeopardy claims. A "pure" claim we are informed, is presented by a case such as *Abney* which can be quickly decided; an impure claim is one requiring appellate courts "to analyze the elements of the charges against the defendant, sift through the trial transcript, review evidentiary exhibits" and the like. (Br. 6) This latter class of impure case is to be denied interlocutory review. We alas – according to respondent – are proponents of an impure claim and are to be shunned by this Court therefore. In its zeal to qualitate that which is merely quantitative, respondent has overlooked a line of double jeopardy cases which demand the very plenary examination it inveighs against.

> "Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, *Ashe v. Swenson, supra,* and it is a matter of constitutional fact this Court must decide through an examination of the entire record." *Turner v. Arkansas,* 407 U.S. 366, 368 (1972).

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter. . . ." *Ashe v. Swenson,* 397 U.S. 436, 444, 1970).

Accordingly, it is clear that the depth of review cannot be a bar to consideration of an otherwise viable double jeopardy claim.[1]

In its closing effort to ward off the petition, respondent concludes that while there is presently no conflict in the circuits over the Question Presented, given the state of the relevant decisions, it anticipates the emergence of such a conflict "some day." (Br. 12) Even a cursory review of those decisions reveals that that day has arrived. A conclusion shared by veteran Judges Tamm and Wilkey:

> "Two circuits have held that the trial court's denial of a double jeopardy claim based on the insufficiency of the evidence is not immediately appealable under *Cohen*. One circuit has held to

[1]Despite respondent's protestation's to the contrary, appellate judges can screen insufficiency claims very quickly from a reading of the opposing briefs to determine whether the claim is worthy of full review or is merely spurious. Respondent, we note, was able to summarize the trial evidence herein in one and a half pages in its brief. (Br. 2-3)

A seemingly wasteful labor in view of the fact that, after reviewing the evidence, respondent abandoned its task *in medias res* declining to traverse our well documented showing of the legal insufficiency thereof. (Pet. 9-12) A most revealing omission, since even a minimal counter offer of sufficiency would have aided respondent's efforts to repel the petition.

the contrary." (Pet. App. A, pp. 6a-7a, footnotes omitted.)[2]

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
*Robert D. H. Richardson*

September, 1983

[2]In *United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982) at page 686, three additional judges perceived a collision between that opinion and precedents in the four, fifth and ninth circuits. We thus have a total of five federal appellate judges who see a conflict in the circuits over the Question Presented where respondent sees none.

No. 82-2113

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D.H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF FOR ROBERT D.H. RICHARDSON

Allan M. Palmer
*(Counsel of Record)*
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
Robert D.H. Richardson

November 1983

THE CASILLAS PRESS, INC. – 1717 K Street N. W. – Washington, D. C. – 223-1220

## QUESTIONS PRESENTED

### I

Whether a criminal defendant whose first trial ended in a hung jury has the right to immediately appeal from the denial of his motion to bar retrial on the ground of former jeopardy, when he alleges that the evidence at trial was legally insufficient to have sustained his conviction and he cannot therefore, be forced to "run the gauntlet" of a second prosecution.

### II

If there is jurisdiction to consider the double jeopardy claim, whether the evidence at trial was legally sufficient to sustain the remaining two counts of the indictment – petitioner having been acquitted by the jury of the third count.[1]

---

[1]We observed in a footnote to the Question Presented in our petition (n. 1), that if there is appellate jurisdiction to entertain the double jeopardy claim, "then the sufficiency of the evidence *vel non* would be a subsidiary question fairly included in the Question Presented." Since the grant of certiorari did not limit us to the jurisdictional issue, the sufficiency of the evidence determination is properly before the Court.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** Page

Page

Page

Page

**Constitution and Statutes:**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

---

ROBERT D.H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

## BRIEF FOR ROBERT D.H. RICHARDSON

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

### JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 11, 1983. A combined petition for rehearing and suggestion for rehearing en banc was filed on April 5, 1983, and denied on April 27, 1983. The petition for a writ

of certiorari was filed on June 27, 1983 and granted on October 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

## STATEMENT OF THE CASE

Petitioner and one Leroy Cooper were jointly indicted in the United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846 (JA 9a). Cooper fled prior to trial and petitioner was tried to a jury resulting in a partial verdict of not guilty to one count of distribution and a mistrial on the remaining two counts following a deadlocked jury (JA 3a). Thereafter, petitioner renewed his motion for judgment of acquittal and also moved to bar retrial on the ground of former jeopardy (JA 3a). The district court denied these motions and petitioner appealed (JA 4a, 20a). The court of appeals (2-1) dismissed petitioner's interlocutory appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The evidence at trial showed that Special DEA Agent John Lee became acquainted with Leroy Cooper during the period between August and December of 1980. Cooper worked at a barber shop located at 1812 7th Street, N.W., Washington, D.C. During these four months Agent Lee

arranged to purchase narcotics from Cooper ten times (Tr. I 27-28).[2]

On September 21, 1980, Agent Lee made arrangements with Cooper to purchase narcotics the next day. On September 22 he met Cooper at the barber shop around 2:00 p.m. (Tr. I 29-30), and was told that he, Cooper, had to go get the "package" (Tr. I 72). After about 25 minutes they left in a vehicle driven by Cooper. The latter drove very erratically in an effort geared at counter-surveillance. They drove to Fifteenth and Ives Street, S.E. where Cooper parked and was given $5,000 by Lee (Tr. I 31-32, 120, 126). Cooper left and walked toward a Gino's restaurant. A short time later surveillance Agent Orville Kleppinger saw Cooper getting out of a Mercury Cougar convertible, bearing D.C. license tag number 432 238, which was stopped at the corner of 15th and K Streets, S.E. (Tr. I 123). During Cooper's absence Lee went to a telephone booth and called his office to give his location. Upon returning to the car Cooper informed Lee that his source was curious why Lee had used the telephone (Tr. I 33). Cooper then gave Lee a package containing about two ounces of heroin which tested out to be 31% pure (Tr. I 33-34, 188). Lee gave Cooper $100 for obtaining the drugs and they drove back to the barber shop (Tr. I 35-36). At about that same time surveillance Agent Kenneth Feldman spotted the Cougar that Kleppinger had seen earlier. He followed the car for several blocks when it pulled into a

[2]"Tr. I" refers to the volumes of the trial transcript consecutively paginated 1-372, containing all the testimony except for the direct examinations of Agents Andrew Johnson, William Vislay, and Charles West. "Tr. II" refers to the 36 page volume of transcript containing their direct testimony.

gas station and the driver-occupant, a black male, walked toward a phone booth. Feldman did not recognize him and, accordingly, had no occasion to identify petitioner at trial (Tr. I 124-127). Agent Lee never saw appellant on September 22 (Tr. I 54). No evidence was introduced by the Government establishing the registered owner of the Cougar.

Between September 22 and October 21, Agent Lee spoke to Cooper on the telephone five to ten times and purchased heroin from him once in a transaction unrelated to this indictment or petitioner (Tr. I 74-75, 190).[3] When Lee called Cooper on October 20, Cooper stated – Lee testified over objection[4] – that he knew Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought at 15th and Ives Streets in September (Tr. I 37-42, 187, 190-191). On October 21 Lee went to the barber shop, where Agent Andrew Johnson had set up video-tape surveillance (Tr. II 3-6). Lee and Cooper spoke outside and Cooper stated – Lee testified over objection (see n. 4) – that his source would bring the heroin to the shop as soon as Cooper called and placed the order (Tr. I 37-43, 191-192). Lee then left the area (Tr. I 43; Tr. II 7). About a half-hour later, petitioner drove up to the shop in a Mercury Cougar con-

---

[3]A continuance motion filed by petitioner on June 15, 1981, (JA 14a), outlined Cooper's other alleged sales to Lee. *I.e.*, Crim. No. 81-102, a five-count indictment naming Cooper alone for distributions on September 3, 9, 16, 30 and December 5 of 1980. Crim. No. 81-103, a four-count indictment alleging a conspiracy between Cooper and Larry Wyder plus two joint distributions by them on August 26 and 28, 1980. Wyder was named alone in count four.

[4]The objection was on the ground that a conspiracy had not been proven allowing for the introduction of this hearsay testimony against petitioner (Tr. I 40-42).

vertible with the same license tag number as the car involved in the September 22 transaction (Tr. II 7-8). Petitioner got out of the car, spoke to Cooper for several minutes, and drove off (Tr. II 7-8). When Lee returned to the barber shop, Cooper told him – Lee testified over objection (see n. 4) – that his source had been there, sensed the presence of police and therefore he and Lee would have to drive to another location (Tr. I 37-42, 187, 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (Tr. I 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick being driven by Wesley McCray (Tr. II 9-10). After a second change of locations for the same reason, *i.e.*, the source sensed the presence of police, petitioner got out of the Buick and McCray drove the car to the 800 block of P Street where he met Cooper (Tr. I 45-47, 193, 280-281). Two or three minutes later Cooper returned to Lee's car and gave him a plastic bag containing over an ounce of heroin which tested out to be 30% pure (Tr. I 189). Petitioner's fingerprint was recovered from a piece of tape sealing the bag (Tr. I 48-49, 106, 113-114). Agent Lee did not see petitioner on October 21 (Tr. I 54, 75).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter petitioner unsuccessfully moved for a judgment of acquittal and to bar retrial on the ground that the evidence regarding the remaining counts had been legally insufficient to support a conviction. Petitioner appealed from the district court's denial of his motion, and the court of appeals dismissed for want of jurisdiction. The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial court's ruling on the suffi-

ciency of the evidence" (Pet. App. 3a). Since the trial court's order was not appealable as a final judgment, petitioner's double jeopardy claim was not subject to meaningful review *at this time* and accordingly, his appeal was ordered dismissed. The court further held that review of the issue would not be lost to petitioner, because he could raise that precise claim when appealing his conviction following his second trial (Pet. App. 5a-6a).

## SUMMARY OF ARGUMENT

### I.

Respondent concedes that petitioner has raised a valid double jeopardy claim and that he can challenge the sufficiency of the evidence presented at his first trial, which ended in a hung jury, *but only* when appealing his conviction at the second trial. Petitioner, on the other hand, relying upon *Abney v. United States,* 431 U.S. 651 (1977), urges that he is entitled to immediate interlocutory review of his claim in order to bar an unconstitutional retrial. Every foreseeable detriment to a criminal defendant flowing from a retrial in violation of the Double Jeopardy Clause present in *Abney* is extant here.

Respondent and the several courts of appeals it relies upon err in concluding that the insufficiency of the evidence claim's main thrust is to controvert the merits of the prosecution and, thus, fails to raise a collateral issue which is a requisite for interlocutory review. In reality, that single allegation of insufficiency yields two concurrent results: (1) it reveals a cognizable double jeopardy violation which bars reprosecution and, (2) it provides the factual answer to whether or not the alleged violation has been established. The claim *in limine*, thus meets the second

prong of the Court's test by raising a collateral and independent bar to the prosecution – respondent having conceded that petitioner has satisfied the other two prongs. Merely because the claim also possesses this secondary role as the factual determinant of whether or not an alleged double jeopardy violation has been proven, cannot vitiate its main function of barring reprosecution – a common goal it shares with all other double jeopardy claims, no matter how diverse their factual bases for relief may be. In any event, the raising of a cognizable double jeopardy violation which if proved bars the prosecution, *automatically* satisfies the criteria for interlocutory review.

II

In assaying the sufficiency of the evidence to support the alleged conspiracy – excluding, of course, consideration of all hearsay statements of Leroy Cooper implicating petitioner in any such scheme introduced over objection – it is clear that only one narcotic transaction involving petitioner was proved, *i.e.*, October 21, 1980. The sale one month earlier to Leroy Cooper by the unidentified driver-occupant of a Mercury Cougar was inadequately tied to petitioner to support the inference that he was the vendor. The only evidence adduced to connect him with that transaction was the fact that he drove that same Mercury Cougar on October 21. However, since ownership of the car was not proven by any registration records, petitioner's driving the vehicle on one occasion a month later does not demonstrate that he was its owner, nor does it prove that he drove it at the time of the first transaction. This conclusion is reinforced by the fact that a trained surveillance agent who saw the vendor of September 22 attempt to

place a phone call during daylight hours shortly after the transaction, did not identify the caller as petitioner. Thus, the only competent evidence adduced to support the conspiracy is the sale of October 21, in which petitioner unquestionably participated.[3] That single sale is only competent evidence, however, to prove a buyer-seller relationship between petitioner and Cooper – a relationship which is universally deemed *not* to establish a conspiratorial scheme. "In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963). This is especially true herein, because there was no evidence to otherwise illuminate the transaction since Cooper was a fugitive at the time of trial, and Agent Lee never met with nor even saw petitioner prior to his arrest on April 15, 1981. Moreover, on the remote chance that petitioner is deemed by the evidence to have participated in two sales to Cooper one month apart, those two isolated transactions considered together still do not yield a conspiracy finding.

Since the theory of the remaining substantive distribution count was that the Cooper to Lee narcotic transfer concomitantly established petitioner's vicarious guilt by virtue of his criminal partnership with Cooper, failure to prove the conspiracy, *a fortiori,* entitles petitioner to a judgment of acquittal on this count which hinged on the very existence of that conspiracy.

---

[3]Since we are required to view the evidence in the light most favorable to the Government, we have totally disregarded petitioner's strong defense on the merits which was credited by less than a unanimous jury. See Tr. I 222-261.

## ARGUMENT

### I

### Abney v. United States, 431 U.S. 651 (1977), Authorizes The Instant Interlocutory Appeal Which Raises a Concededly Legitimate Double Jeopardy Claim.

Since *Burks* v. *United States,*[6] it is clear that a criminal defendant can challenge the sufficiency of the evidence presented at his first trial, which ended in a hung jury, when appealing his conviction at the second trial.[7] This much respondent has readily conceded in the court of appeals[8] and this Court.[9] Thus, the second *trial* itself would be impermissible, because it implicates the defendant's right not to be twice placed in jeopardy. The court of ap-

---

[6]437 U.S. 1 (1978).

[7]In addition to the instant case, Pet. Ap. 11a-14a; See, *United States v. Balano,* 618 F.2d 624, 632 n. 13 (10th Cir. 1979); *United States v. Bodey,* 607 F.2d 265, 267-268 (9th Cir. 1979) (reversed); *United States v. Wilkinson,* 601 F.2d 791, 794-795 (5th Cir. 1979); *United States v. Rey,* 641 F.2d 222, 225-226 (5th Cir. 1981); *United States v. Becton,* 632 F.2d 1294, 1296 (5th Cir 1980).

[8]"Indeed, in the present case the government concedes that Richardson's insufficiency claim will not be lost if it is not reviewed at this time, noting that 'in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction.'"[18] "[18]Appellee's brief at 14 n. 3. . . ." (Pet. Ap. 5a-6a) (Brackets in original).

[9]"It is nevertheless worth noting that the reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient would afford the petitioner substantial and valuable relief, even if it does come too late to avoid the retrial itself." (Resp. Opp. 7 n. 5).

• • • •

"[T]his case presents the common, if lamentable, situation in which the accused must bear 'the discomfiture and cost of a prosecution' before his claim may properly be 'reconsider [ed] by an appellate tribunal'." (Resp. Opp. 11).

peals correctly summed up the litigants' position on this score:

> "[T]he double jeopardy clause is violated if the government has a full and fair opportunity to convict a defendant, fails to produce enough evidence to sustain its constitutional burden to present legally sufficient evidence, and is then given another opportunity to obtain a conviction." (Pet. App. 14a).

It is at this juncture that we part company with the lower court and respondent in pinpointing the stage in the judicial process at which petitioner can enforce his constitutional right not "to be twice put in jeopardy." They urge that petitioner's right to avoid a second unconstitutional trial can only be vindicated by undergoing a second unconstitutional trial.[10] We contend that the remedy of immediate interlocutory review vouchsafed to petitioner by *Abney v. United States,*[11] protects him from having to "run the gauntlet" anew. As we read that opinion, it seems clear to us that its animating principle was grounded in the notion that the Double Jeopardy Clause stands as a bar to *trials* that would do violence to its precepts. Accordingly, interlocutory appeals were authorized lest the rights protected vanished before they could be established and enforced. Courts of appeals were thus, entrusted with the duty of preventing unconstitutional retrials – certainly

---

[10]Since the court of appeals dismissed for want of jurisdiction, the posture of the case is analogous to that of a complaint being dismissed for want of jurisdiction requiring the allegations therein to be taken as true. *Cooper v. Pate,* 378 U.S. 546 (1964). Therefore, for purposes of the present review it must be assumed, as alleged by petitioner, that the evidence adduced at trial to support the indictment was legally insufficient to shoulder its burden.

[11]431 U.S. 651, 663 (1977).

not encouraging them. Nothing demonstrates this purpose as cogently as the following language from Abney:

> "The rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. . . . It is a guarantee against being twice put to *trial* for the same offense . . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.
>
> We therefore hold that pretrial orders rejecting claims of former jeopardy, . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." 431 U.S. 660-662. (emphasis in original) (unanimous judgment).

Petitioner, as did the petitioner in *Abney*, contests the very authority of the "Government to hale him into court to face trial on the charge against him"[12] and thus, advances a claim which lies at the very nerve-center of the Double Jeopardy Clause. If he is correct in his evaluation of the evidence as we must assume, why should this petitioner endure an unconstitutional retrial before his right to be set free is recognized. To deny petitioner his appeal

---

[12]431 U.S. 659.

would, in effect, create a new class of deferred double jeopardy case not entitled to the "full protection"[13] of the Double Jeopardy Clause when no valid reason for the disparity appears to exist. Petitioner, like all others who advance a legitimate double jeopardy claim would be forced to endure "the personal strain, public embarrassment, and expense"[14] of an erroneous retrial. But that is not the end of it. For, if convicted, petitioner would further endure the lengthy deprivation of his liberty while his rights were being vindicated on appeal. In our experience, denial of bond pending appeal from a conviction would be routine herein because of the nature of the case, petitioner's prior conviction, and the Government's tenacity in these matters. Thus, the totality of the impact resulting from the denial of petitioner's right to interlocutory review would yield nothing less than a startling and unwarranted departure from *Abney*.

All those who would deny petitioner his sought-after remedy do so by giving *Abney* grudging application, rather than recognizing the broad principle of review it established. Despite the numerous clear-cut arguments that innervate petitioner's claim, respondent seizes upon a phrase in *Abney* which, we are assured, signals petitioner's retrial. The coveted language appears during the Court's discussion of the second prong of the so-called three-prong test of *Cohen v. Beneficial Industrial Loan Corp;*[15] the Government having conceded that petitioner has satisfied the other two prongs (Resp. Opp. 7 n.5).

---

[13] *Id.*, at 662.

[14] *Id.*, at 661.

[15] 337 U.S. 541 (1949).

> "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him." 431 U.S. at 659.

Respondent's argument proceeds, that since the sufficiency of the evidence inquiry goes to the very heart of the prosecution, the double jeopardy issue it raises is not collateral to the proceeding; accordingly, petitioner has not met the second prong of the collateral order test. (Resp. Opp. 7) Deeper analysis, however, discloses the erroneous reasoning that underlies this theory.

In the double jeopardy context presented by this case, the alleged insufficiency of the evidence spawns dual results. On the one hand it generates the very constitutional issue sought to be reviewed and, on the other, it traverses the merits of the prosecution. It is, no doubt, this unique self-determining quality of the claim, *i.e.*, one which, simultaneously, provides both the question and the answer, that has led respondent and several courts of appeals astray.

By first generating the double jeopardy issue — insufficient evidence resulting in a hung jury does not permit the Government another chance to secure a conviction — the second prong of the *Cohen* test has been met by the raising of a collateral and independent bar to the prosecution. This is an identical result it shares with all double jeopardy claims, no matter how otherwise divergent their factual grounds for relief may be. Merely because petitioner's claim also possesses a secondary role as the determinant of

whether or not the double jeopardy violation has been proven, in fact, cannot annul its main purpose of establishing a collateral bar and unlocking the appellate door. By concentrating on the claim's more visible but subordinate factual role, respondent and the cases it relies upon have inverted the correct order of priorities and, accordingly, hit the wrong target by probing the answer instead of evaluating the question.

*E.g.*

> "Therefore, since Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time . . . [A]nd because that issue is the *only* basis for Richardson's double jeopardy claim, Richardson has failed to make *at this time any* double jeopardy claim which can be reviewed by an appellate court." (Pet. App. 8a-9a) (emphasis in original).

The inevitable result of this approach is the conclusion, that while the alleged insufficiency of the evidence raises a double jeopardy violation, it can only be vindicated after a criminal defendant has "run the gauntlet" of a retrial.[16] A

[16]In addition to the instant case, Pet. Ap. 11a-14a, see *United States v. Rey, supra* n. 6; *United States v. Becton, id.; United States v. Ellis,* 646 F.2d 132 (4th Cir. 1981). But see, *United States v. Sneed,* 705 F.2d 745 (5th Cir. 1983), whose reasoning and result are inconsistent with the earlier *Becton* and *Rey* cases from the same circuit. It was, we believe, the clear insufficiency of the evidence in *Sneed* which prompted the court to retreat from those contrary holdings and authorize interlocutory review. A result the concurring judge in *United States v. Ellis, supra,* would also encourage in the context of insufficient evidence "entirely manifest on the face of the record." 646 F.2d at 136. A practical solution achieved, no doubt, to preclude clearly superfluous, time-consuming retrials, but one which cannot conceptually survive without permitting interlocutory review in this type of case across the board.

rather difficult position to maintain, since the Court has previously rejected this very procedure. *Abney v. United States, supra,* 662.

Alternatively, if we are in error, then it is our contention that the raising of a cognizable double jeopardy claim which if proven, bars the prosecution, *automatically* satisfies the criteria for the collateral order exception as set forth in *Cohen*. In *Abney,* the Court appears to be saying just this.

> "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principle issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659.

In analyzing this language the court in *United States v. McQuilkin*[17] – the case which caused the conflict in the circuits over the Question Presented – reaches this precise conclusion:

> "Although the evidence which must be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of a conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is, as *Abney* emphasizes, the *nature* of the claim that makes the case eligible for immediate appellate review. The defendant 'is contesting the very authority of the Government to hale him into court to face trial on the charge against him'." 673 F.2d at 685 (emphasis in original).

At bottom, it is fair to say that the Court did not have a situation such as the one at bar in the forefront of its consideration when discussing the *Cohen* factors in *Abney*.

---

[17] 673 F.2d 681 (3rd Cir. 1982).

The opinion, accordingly, assumes the presence of a collateral issue by the mere raising of a double jeopardy violation – a result extant herein. By far the most important *Cohen* factor relied upon in authorizing interlocutory appeals was the third one, *i.e.*, an important right would be irretrievably lost if immediate review were denied. See *United States v. McDonald,* 435 U.S. 850, 860 n.7 (1978).

Accordingly, since petitioner raised a concededly valid double jeopardy claim in the district court, its denial entitled him to immediate interlocutory review.[18]

II

**The Evidence Was Insufficient To Support A Conviction For the Conspiracy Alleged In Count One of the Indictment Or The Joint Distribution Alleged In Count Three Thereof**

**A. The Conspiracy Count**

The indictment is a relatively simple pleading which alleges in count one that petitioner and Leroy Cooper conspired from September 22, 1980, to October 21, 1980, to distribute and possess heroin with the intent to distribute

[18]If respondent's opposition to our petition is prologue, we can soon expect the following considerations to be raised in an attempt to defeat interlocutory review:

1. The piecemeal examination of criminal cases such review would entail Resp. Opp. 6.

2. The attendant delay and disruption in the trial courts resulting from these interlocutory appeals *id.*, 5.

3. The increase of frivolous double jeopardy claims on appeal which would burden the already overburdened courts, *id.*, 6.

However, since these very same spectres were advanced by respondent's unsuccessful brief on the merits in *Abney* – pp. 16-18, 28-29, 45-46, 50-51 – there is no reason to believe that they will be any more formidable now in achieving their purpose than they were in 1977.

it. The objective of this joint venture was alleged to be the making of money. In analyzing the sufficiency of the evidence, we view it in the light most favorable to the Government, affording it the benefit of all inferences that logically flow therefrom without regard to the credibility of witnesses. *Glasser v. United States,* 315 U.S. 60, 80 (1942). In assessing the available evidence to determine whether or not the conspiracy was proven and if petitioner was a member thereof, we will exclude from consideration, however, all hearsay statements made by Leroy Cooper implicating petitioner in any such scheme made out of the latter's presence and introduced over objection.

> "[S]uch declaration are admissible . . . , only if there is proof *aliunde* that he is connected with the conspiracy . . . Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence" *Glasser v. United States* supra, 74-75.

See also, *United States v. Gresko,* 632 F.2d 1128, 1131 (4th Cir. 1980) ("[C]o-conspirator's out of court statement is not independent evidence of the very conspiracy on which its admissibility depends"); *United States v. Murzyn,* 631 F.2d 525, 532 n. 13 (7th Cir. 1980) ("The proof of membership must be shown by the alleged co-conspirator's own acts and declarations."); *United States v. Haldeman,* 559 F.2d 31, 118-119 (D.C. Cir. 1976) (same).

From this angle of vision, the overall picture consisted of Agent Lee prodding an unsuspecting Cooper to procure narcotics for him on ten occasions. Only two of these purchases were alleged to be related to petitioner; he being a stranger to the other eight transactions. On September 22, 1980 at about 3 p.m., Cooper bought drugs for $5,000 from an unidentified man in a Mercury Cougar which Cooper redistributed to Agent Lee. A surveillance agent

saw the vendor a short time later as he attempted to place a phone call from a service station. At trial, this agent could not identify this person as petitioner nor did he state that the caller resembled him as to height, build, complexion or the like. No evidence was introduced to establish the registered owner of the Mercury Cougar. Obviously, nothing at this point connects petitioner to the transaction forming count two of the indictment of which he was acquitted.

About one month later on October 21, petitioner drove up to the barber shop in the same Mercury Cougar seen on September 22, had a brief conversation with Cooper and drove off. After Lee arrived at the shop, he and Cooper drove to a location where the latter was to purchase some drugs. Lee gave him $2,500 for this purpose. During these events petitioner was seen getting into a yellow Buick driven by Wesley McCray. Cooper made contact with the Buick resulting in a change of location for the transaction. At that destination McCray *alone* met Cooper and sold him the narcotics for $2,500. Petitioner's fingerprint on the narcotic package certainly thrust him into this sale in light of the other evidence of his involvement that day. However, the fact that petitioner both participated in a narcotic transaction on October 21 and also drove the Mercury, did not provide the requisite link to establish that he was the driver-vendor one month earlier. Since there was no evidence that the car was registered to petitioner and he only drove it on this one verified occasion, it is impossible to conclude that the car belonged to him. Indeed, when the Government sought to prove car ownership it did so by introducing the registration certificate into evidence. The procedure followed when it proved that the yellow Buick was owned by Wesley McCray (Tr. I 289). When this omission is considered along with the fact that it is not uncommon in a major city for an individual

to drive another's car, the isolated fact that petitioner drove the Mercury one day a month after the first transaction is not probative of the sought-after conclusion that he drove it and sold drugs therefrom on the earlier date. This gap between proof and inference is further widened by the following considerations: (1) the trained surveillance agent who tracked the Mercury on September 22 for the very purpose of observing the driver and did observe him attempting to place a phone call during daylight hours, could not identify this suspect as petitioner, (2) this lack of identification coupled with the fact that petitioner strenuously avoided personally delivering any drugs to Cooper on October 21, yield a compelling countervailing inference that petitioner was *not* the driver-vendor on the earlier occasion. Thus, however viewed, the events of September 22 provide no "substantial independent evidence of a conspiracy"[19] to connect petitioner with the first count of the indictment.

---

[19] *United States v. Nixon*, 418 U.S. 683, 701 n. 14 (1974). The *Nixon* formulation is the test applied in the court below and the fifth circuit. *United States v. Slade*, 627 F.2d 293, 307. (D.C. Cir. 1980); *United States v. James* 590 F.2d 575, 580-81 (5th Cir. 1979). Other circuits, discounting the validity of what the Court said in *Nixon*, use a "fair preponderance of the independent evidence" test. *United States v. Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975); *United States v. Trotter*, 529 F.2d 806, 811-812 (3rd Cir. 1976); *United States v. Santiago*, 582 F.2d 1128, 1135 (7th Cir. 1978). Until altered, however, we shall continue to use the *Nixon* "substantial independent evidence of a conspiracy" test throughout this brief, which was referred to by the Court at the time it was announced as the "standard" against which the trial judge should evaluate the evidence. *Nixon, supra*, n. 14 at 701.

This divergence in the circuits recognized by the court below in *United States v. Jackson*, 627 F.2d 1198, 1219 (D.C. Cir. 1980), leads us to another matter. Although our petition at n. 1 indicates that if jurisdiction exists to consider the double jeopardy claim then the sufficiency of the evidence *vel non* would be a fairly included subsidiary question, respondent's opposition suggests, that in the event of finding jurisdiction, then the case should be remanded to the court of ap-

In reality, the only competent evidence adduced to support the conspiracy boils down to the events of October 21. The Government, in addition to its burden of demonstrating substantial independent evidence of a conspiracy, must also establish "beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute." *United States v. Cangiano,* 491 F.2d 906, 909 (2d Cir. 1974). In the instant case this would require substantial independent evidence that petitioner and Cooper had a "partnership in criminal purposes" *United States v. Kissel,*[20] whose goal or specific intent was "to distribute and possess with intent to distribute quantities of heroin." (quoting count one of the indictment). Actually, since McCray sold the drugs to Cooper aided and abetted by petitioner, the evidence more realistically yields a drug conspiracy between petitioner and McCray than one between petitioner and the customer, Leroy Cooper.

On this evidence of one sale, it cannot be concluded that a conspiracy with Cooper was created which petitioner entered into with the specific intent of drug redistribution for financial benefit as the unlawful object of that combination. On the contrary, the sale to Cooper yielded the profit and there is no evidence, let alone substantial independent evidence, that petitioner intended to share in any further profits of his vendee. Fortunately, we do not ap-

---

peals to consider the merits of that claim Resp. Opp. 13 n. 11. We urge that this split further impels the Court to undertake a consideration of the merits of the claim – should appellate jurisdiction exist – in order to quell this unwarranted conflict in the circuits. A not unprecedented evidentiary review in light of *Abney* itself, which explored the merits of the double jeopardy claim after the court of appeals merely affirmed the case by a judgment order 530 F.2d 963 (3rd Cir. 1976).

[20]218 U.S. 601, 608 (1910).

proach these facts from a clean slate and need only look to the Learned Hand opinion in *United States v. Peoni,* 100 F.2d 401 (2d Cir. 1938), and its progeny, to demonstrate the utter failure to prove the conspiracy alleged herein.

In that text-book case the evidence showed that Peoni sold counterfeit bills to one, Regno; and Regno resold the same bills to one, Dorsey. All three knew the bills were counterfeit and Dorsey was later arrested while trying to pass them. The issue was whether Peoni was party to a conspiracy by which Dorsey was to possess the bills. The Government's theory was that, as Peoni put the bills in circulation and knew that Regno would be likely not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural and foreseeable consequence of Peoni's original act. Judge Hand thought that this theory would have been of some moment had it been a civil case, but that the argument was unavailing to underpin a conspiracy charge.

> "Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. . . . Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it . . . ." 100 F.2d at 403.

Thus, at best we have herein a buyer-seller relationship between petitioner and Cooper with no further purpose or intent proved other than to effect the sale. Even if we assume that petitioner understood that Cooper would resell the drugs that does not mean that he intended to

become Cooper's partner in that endeavor and share in the profits. Like Peoni, petitioner "had no concern with the [drugs] after [Cooper] paid for them."

Furthermore, in the case at bar the Government is precluded from even arguing that petitioner was aware that the drugs in question were targeted for resale as opposed to personal use. While expert testimony concerning the quantity and quality of the heroin might have permitted an inference of foreseeable resale, the prosecutor never adduced such testimony. When he sought to have Agent Lee testify as an expert on this score our objection to Lee's testimony was sustained (Tr. I 194-196). Thereafter, the prosecutor declined the court's specific invitation to produce competent expert testimony concerning the drugs (Tr. I 201).

Additional authoritative support for our conclusion is provided by *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972), wherein Godwin bought fifty thousand (50,000) amphetamine tablets from Spanos. On another occasion Spanos refused to sell him pills because he believed he was being followed. Godwin testified for the prosecution that he had known Spanos for about a year and a half and "on occasions" bought pills from him. He, Godwin, resold the pills purchased from Spanos to an undercover agent named Herring. At trial, Spanos was convicted upon an indictment charging him and Godwin with a conspiracy to sell and possess for sale stimulant drugs. The Court of Appeals reversed the conviction relying on *Peoni*. "[T]here is no evidence that Spanos had agreed with Godwin that Godwin was to resell to Herring or to anyone else. This does not show the charged conspiracy even, *prima facie*." 462 F.2d at 1015. The Court so held even though it specifically found: "Like Peoni, Spanos sold, presumably knowing that Godwin would probably resell . . . ." *Id.*, at

1017. *Spanos* was cited with approval by the Court in *United States v. Nixon, supra,* 701 n.14. See also, *United States v. Meyers,* 646 F.2d 1142, 1145 (6th Cir. 1981) ("Insufficient evidence to show that Calvin and Meyers conspired to distribute cocaine. The evidence showed only a buyer-seller relationship between them."); *United States v. Bostic,* 480 F.2d 965, 969 (6th Cir. 1973) ("There is no evidence that . . . Bartlett ever entered a single counterfeiting conspiracy with [4 persons] to . . . sell and utter counterfeit money . . . The utmost that could be claimed . . . is that [he] sold counterfeit bills to Bostic. If it be assumed that he did sell such . . . bills to Bostic, the law is plain that he was not guilty of the conspiracy claimed."); *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963) ("The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."); *United States v. Reina,* 242 F.2d 302 (2nd Cir. 1957); *United States v. Koch,* 113 F.2d 982, 983 (2d Cir. 1940) ("The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest.").

To contrast the failure of this evidence to prove a conspiracy, we can compare the case with several that have deemed the facts sufficient to warrant the finding that a conspiratorial scheme existed aimed at redistribution. In *United States v. Calabro,* 467 F.2d 973, 981 (2d Cir. 1972), the court held that the vendor's participation "went deeper than supplying the [stolen bonds] in a few isolated transactions with no concern for the remainder of the operation."

The vendor supplied most of the bonds cashed by the vendees and their agents, often receiving a percentage of the proceeds. "The forging and uttering were thus a prerequisite to his realization of profit." In *United States v. Campisi,* 306 F.2d 308, 309, 311 (2d Cir. 1962), the vendors of stolen bonds sold some of the bonds to the same group on credit over an eight-month period. The court held that the "credit aspect of the transaction suggests that if the bonds could not be resold [the vendors] would not be paid." Accordingly, the vendors were deemed to have the requisite "stake in the success of the venture" to support a conspiracy conviction. In *United States v. Sin Nagh Fong,* 490 F.2d 527, 531 (9th Cir.1974), appellant sold, or was about to sell (when arrested), heroin and cocaine to Rogers four times in a 31-day period. During that month they also had a drug related conversation which was overheard by a federal agent. Even though the evidence of conspiracy was circumstantial, the court held that such concert of purpose was proved. First, based on *expert testimony* in the case about the drugs, a reasonable fact finder could conclude that appellant sold wholesale quantities to Rogers for redistribution. This coupled with "multiple sales over a relatively brief period while [appellant] actively encourag[ed] Rogers to expand the volume of his business"[21] was sufficient to establish a conspiracy. "Appellant had a stake in the success of Rogers' activities" 531 n. 4.

In the case at bar, there is no direct testimony of any agreement between Cooper and petitioner. Cooper was a fugitive at the time of trial, and Agent Lee never met with or even saw petitioner prior to his arrest. While Cooper may have been buying drugs from others for Lee, the

[21]This conclusion was based on the overheard conversation.

available facts herein only yield the conclusion that on October 21 petitioner and McCray sold drugs to Cooper for $2500. That single act provides no rational connection for any inference that petitioner and Cooper had any understanding relative to future transactions or shared mutual goals. For all we know, or can ever know, October 21 was the end of the line between the parties. Indeed, the objective facts revealing Cooper's multiple sales to Lee – totally unrelated to petitioner – drives the latter's one sale but deeper into the realm of a "casual transaction."

Moreover, on the remote chance that the totality of the evidence is deemed to prove two sales by petitioner to Cooper one month apart, that additional sale does not alter the absence of a conspiracy finding. Once again, we would have but two *isolated* transactions in a continuing series of ten between Cooper and Lee extending into December, which fall outside the ambit of conspiracy. Since there is zero evidence that petitioner knew that Cooper was purchasing the drugs for anyone else, the fact that he bought drugs for $5,000 one time and $2,500 another about a month apart, could very well lead the vendor to the conclusion that these drugs were intended for his personal use.

The sum of $5,000 for a one-month personal drug supply may not be excessive, especially when there is no countervailing expert testimony concerning the potential commercial impact of these drugs as opposed to personal use, or personal use coupled with sales to support the habit, because the prosecutor declined to introduce any such testimony (Tr. I 201).

At bottom, this record when viewed in the light most favorable to the Government falls short of proving by "substantial independent evidence" the conspiracy alleged in count one of the indictment.

"Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."[8]

[8]"This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. . . ."
*Direct Sales Co. v. United States,* 319 U.S. 703, 712 (1943).

**B. The Substantive Count**

The theory of count three (as well as count two) was that the sale or distribution to Agent Lee by Leroy Cooper concomitantly launched petitioner's culpability by virtue of his criminal partnership with Cooper. *Pinkerton v. United States,* 328 U.S. 640 (1946). Since petitioner did not actually participate in that distribution, a partnership theory of criminal liability was the only one available on the facts. Since we have demonstrated that petitioner was entitled to a judgment of acquittal on the conspiracy count, *a fortiori,* he is also to be acquitted for the substantive violation contained in count three which hinged on the very existence of that conspiracy. *Travers v. United States,* 335 F.2d 698 (D.C. Cir. 1964). See also *Sealfon v. United States,* 332 U.S. 575 (1948).

## CONCLUSION

There is jurisdiction to consider petitioner's alleged double jeopardy violation which the facts, upon review, clearly establish. Accordingly, the case should be remanded with directions to dismiss the indictment.

Respectfully submitted,

Allan M. Palmer
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
Robert D.H. Richardson

November 1983

No. 82-2113

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION OF PETITIONER FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*

March 23, 1984

THE CASILLAS PRESS, INC. – 1717 K Street N. W. – Washington, D. C. – 223-1220

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

---

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## MOTION OF PETITIONER FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

---

The intensity of questioning at oral argument precluded our presenting to the Court much of what we had anticipated or, any rebuttal. We deem two matters – not in our briefs – of such import, however, that their presentation now would be useful, we believe, to the Court's resolution of the case. The material refers directly to the issue of whether or not a prior *judicial determination* of insufficiency is necessary before our double jeopardy claim may be considered; a seemingly critical issue, judging from oral argument.

Wherefore, we respectfully request that Petitioner's motion for leave to file a supplemental brief be granted.

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

---

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## SUPPLEMENTAL BRIEF

---

### I

In support of the claim that it is only a *judicial determination* of insufficiency that bars retrial, the government relied upon the holding in *Greene v. Massey*, 437 U.S. 19 (1978), for "confirmation that this interpretation of *Burks* is correct." (Br. 27) In *Greene*, the government observes, the Court considered the effect of a Florida Supreme Court decision reversing a criminal conviction on the *apparent* grounds of insufficiency of the evidence. The Court ultimately remanded to the court of appeals, which would be in a better position to interpret the Florida ruling.

> "But if petitioner's reading of *Burks* were correct, then the actual *holding* of the Florida Supreme Court would be irrelevant; the dispositive question would be whether the evidence at the first trial had in fact been insufficient. That the Court did not consider the question of actual insufficiency at all in *Greene,* or suggest that the court of appeals do so on remand, confirms that the right not to be retried under *Burks* arises solely as a result of judicial determinations of insufficiency – not mere failures of proof by the government. (Br. 27)

Judge Scalia dissenting herein, also espoused this very reasoning in support of his comparable position (Pet. App. 26a).

In the closely analogous case of *Tibbs v. Florida,* 457 U.S. 31 (1982), however, the Court did what it could only do if we are correct, *i.e.,* at n. 21 it pierced the Supreme Court of Florida's construction of its prior opinion and independently evaluated the evidence to see whether or not it was legally sufficient under *Jackson v. Virginia,* 443 U.S. 307 (1979).

> "Any ambiguity in *Tibbs I,* finally, was resolved by the Florida Supreme Court in *Tibbs II.* Absent a conflict under the Due Process Clause, *see n. 21, supra,* that court's construction of its prior opinion binds this Court.[24] 457 U.S. 46-47. (Emphasis supplied)[1]

---

[1]At note 24, the Court alluded to its prior remand in *Greene v. Massey, supra,* and quoted therefrom, *inter alia,* "We even suggested that the Court of Appeals might 'direct further proceedings in the District Court or' . . . ." A clear reference to the authority on remand to pursue an evaluation of the evidence.

Accordingly – under compulsion of the government's reasoning – it is abundantly clear that the right not to be retried under *Burks* arises not merely as a result of judicial determinations of insufficiency – but upon actual failures of proof by the government.[2]

## II

Should a convicted defendant's motion for a new trial be granted pursuant to Rule 33,[3] the government's theory precludes review of his insufficiency of the evidence claim. Since – according thereto – there has been no judicial determination of insufficiency nor the right to obtain one, the government could now increase its evidence and secure a second conviction without ever being held accountable for its failure of proof at the first trial. But, had the district court denied the new trial motion and the defendant appealed his conviction, *Burks* requires him to be set free. The only theory to support a different result if the motion is granted, is one grounded in the notion that by moving for a new trial, the defendant somehow waived his right to secure a judgment of acquittal. This certainly cannot be the intent of counsel who, although he believes the evidence insufficient, further seeks to protect his client to the fullest extent possible, by also moving for a new trial.

We need look no further than this Court's holding in *Burks* to explode the notion that a waiver occurs thereby.

---

[2]Because the validity of our double jeopardy claim was originally conceded by the government, Br. 31 n. 25, our brief did not address this issue and, we only discovered the *Tibbs* material after our reply brief was filed. We are somewhat surprised, however, that the government did not include this quote from *Tibbs* in respondent's brief, which clearly contradicts its stated position.

[3]For whatever reason, *e.g.*, improper closing argument by the prosecutor, a prejudicial news account read by the jurors, etc.

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as his sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial." 437 US. at 17.

It is also certain that the right to hold the government accountable to its burden of proof on appeal, cannot vacillate with whether or not the trial court grants the new trial motion. For if it did, new trial motions would never be filed when counsel truly believed the evidence was insufficient, even though he also believed that he had a valid new trial claim, for fear of losing his right to contest the sufficiency of the evidence. The rights secured to criminal defendants by Rule 33, cannot be conditioned by so heavy a burden as the need to choose between an appeal or the filing a new trial motion. It is therefore not only obvious, but also fair, that the right to contest the sufficiency of the evidence is not lost by the granting of a motion for a new trial.[4] While we, of course, never had to face this dilemma because of the hung jury, petitioner's position is precisely the same as a convicted defendant granted a new trial, insofar as his right to contest the sufficiency of the evidence is concerned.

The bottom line is, *Burks* makes clear that there is no magic in the concept of a *conviction* when it comes to holding the government accountable under the Fifth Amendment to but "one bite at the apple."

Judge Wilkey summed it up correctly in the court below when he observed:

---

[4]Of course, if the district court vacates a conviction for insufficient evidence and enters a judgment of acquittal, the government can appeal from that judicial determination of insufficiency. *United v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983).

"[T]he double jeopardy clause is violated if the government has a full and fair opportunity to convict a defendant, fails to produce enough evidence to sustain its constitutional burden to present legally sufficient evidence, and is then given another opportunity to obtain a conviction" (Pet. App. 14a)

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*

No. 82-2113

# In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MICHAEL W. MCCONNELL
*Assistant to the Solicitor General*

KATHLEEN A. FELTON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page



Constitution, statutes and rule:



Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2113

ROBERT D. H. RICHARDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

### JURISDICTION

The judgment of the court of appeals was entered on March 11, 1983. A petition for rehearing was denied on April 27, 1983 (Pet. App. 32a). The petition for a writ of certiorari was filed on June 27, 1983, and granted on October 11, 1983. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

### STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on two counts

of distributing a controlled substance, in violation of 21 U.S.C. 846, and one count of conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1). At the close of the government's case and immediately before the case was submitted to the jury, the district court denied petitioner's motion for judgment of acquittal. The jury acquitted petitioner on one of the substantive counts but was unable to reach a verdict on the two remaining counts. The court declared a mistrial and scheduled retrial, whereupon petitioner renewed his motion for judgment of acquittal and in addition moved to bar retrial on double jeopardy grounds. The district court denied these motions and petitioner appealed. The court of appeals dismissed petitioner's appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The prosecution presented evidence at trial tending to show that petitioner was the source of two purchases of heroin made by Special DEA Agent John Lee from Leroy Cooper in September and October of 1980.

On September 21, Agent Lee made arrangements with Cooper to purchase narcotics the next day. When on September 22 Cooper arrived at the barbershop where he worked, he told Lee he had to go get the package. Cooper and Lee proceeded together by car. When their car stopped, Lee gave Cooper $5,000 and Cooper got out. In the meantime, Lee went to a telephone booth and called his office. Moments later, an agent saw Cooper get out of a dark color Mercury Cougar convertible. Cooper returned to the car where Lee was waiting and said that his source was curious why Lee had used the telephone. Cooper then gave Lee a package containing about two ounces of 31% pure heroin. I Tr. 29-34, 123, 188.

Between September 22 and October 21, Agent Lee made one additional purchase of heroin from Cooper. When Lee telephoned Cooper on October 20, Cooper said he knew that Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought on September 22. I Tr. 190-191.

On October 21, Cooper told Lee that his source would bring the heroin to the shop, which was under videotape surveillance, as soon as Cooper placed the order (I Tr. 191-192). About a half-hour later, petitioner drove up to the shop in a dark blue Mercury Cougar convertible with the same license tag number as the car involved in the September 22 transaction. Petitioner got out of the car, spoke to Cooper, and drove away. II Tr. 7-8.

When Agent Lee returned to the barbershop, Cooper told him that his source had sensed the presence of police and that they would have to drive to another location (I Tr. 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (I Tr. 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick occupied by Wesley McCray (II Tr. 9-10). After a second change of locations, petitioner got out of the Buick and McCray drove the car to the 800 block of P Street, where he met Cooper (I Tr. 280-281). Two or three minutes later Cooper returned to Lee's car and gave Lee a plastic bag containing over an ounce of 30% pure heroin (I Tr. 189). Petitioner's fingerprint was recovered from the bag (I Tr. 106, 113-114).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter, petitioner unsuccessfully moved for judg-

ment of acquittal and to bar retrial on the ground that the evidence regarding the counts on which the jury was hung had been insufficient to support a conviction.[1] Petitioner attempted to appeal from the district court's denial of his motion, but the court of appeals dismissed for want of jurisdiction.

The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial court's ruling on the sufficiency of the evidence" (Pet. App. 3a). Since the trial court's order was not a final judgment within the strict meaning of 28 U.S.C. 1291, petitioner's insufficiency claim could be reviewed only if it fell within the collateral order exception first recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The court of appeals held (Pet. App. 5a-6a) that the district court's ruling failed to meet the requirements of the *Cohen* exception in two respects. First, the court held that the legal sufficiency of the evidence is "a completely non-collateral issue," since "the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged" (*id.* at 5a) (footnote omitted). Second, the court found that the right to appellate review of the issue would not be lost if immediate review were denied because respondent could raise the issue when appealing his conviction following his second trial (*id.* at 5a-6a). Hence, the court concluded that petitioner had "failed to make *at this time any* double jeopardy claim which can be

---

[1] Petitioner earlier moved for judgment of acquittal at the close of the government's case in chief and again before the case was submitted to the jury, which motions were denied by the trial court. J.A. 2a; I Tr. 203-204, 276, 285-286, 287-288.

reviewed by an appellate court" (Pet. App. 9a; footnote omitted) (emphasis in original).[2]

## SUMMARY OF ARGUMENT

The issue in this case is appealability. We fully share petitioner's premise that the Double Jeopardy Clause would bar his reprosecution on the two counts on which the jury was unable to reach a verdict if a court, having jurisdiction to do so, validly determined that the evidence presented on those counts in the first trial was legally insufficient to sustain a conviction. *Burks* v. *United States*, 437 U.S. 1 (1978). We also have no doubt that, under *Abney* v. *United States*, 431 U.S. 651 (1977), petitioner would be entitled to appeal a denial of a motion to dismiss charges against him if a determination of insufficiency had been made, yet the trial court nonetheless saw fit to permit a second trial. The question in this case is whether petitioner has a right under 28 U.S.C. 1291 to obtain such a determination from an appellate court at this juncture—when the only court to pass upon his claim of evidentiary insufficiency has rejected it, and no verdict has been returned on the charges on which he faces retrial. That question is not answered by *Abney*, for in *Abney* the prior judgment that formed the basis for the claim of double jeopardy had already been made. Nor is the question resolved by *Burks*, for

---

[2] Judge Scalia, in dissent, concluded that the court of appeals had jurisdiction under 28 U.S.C. 1291, but that there can be no double jeopardy violation where, as here, no court or jury had found the evidence at the first trial insufficient (Pet. App. 20a). While based on a different rationale and denominated a dissent, Judge Scalia's view leads to the same conclusion: appellate courts cannot review sufficiency of evidence claims on interlocutory appeal.

*Burks* concerned the *effect* of an appellate finding of insufficiency—not the availability of appellate jurisdiction to make such a finding.

A. We submit that the trial court's order in this case is not appealable under 28 U.S.C. 1291. The order is not "final" in the sense of terminating the proceedings. Nor does it fall within the "collateral order" exception recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and applied in the context of a criminal case in *Abney*. This is because the sufficiency of the evidence is not a collateral issue, but goes to the heart of the question of guilt or innocence. Thus, even assuming the order satisfies all of *Cohen*'s remaining criteria, it is still not a "collateral" order, and is accordingly not appealable prior to final judgment.

B. Moreover, even apart from its failure to qualify under the collateral order doctrine, the order in this case is not appealable because petitioner failed to make even a colorable claim of double jeopardy, which is a necessary predicate to taking an appeal under *Abney*.

1. It is evident from petitioner's own argument on the merits (Br. 16-26) that he is not claiming that the totality of the government's evidence admitted at trial was insufficient to sustain a conviction. Rather, petitioner argues that the evidence was insufficient if certain evidence, which he contends was erroneously admitted, is excluded from consideration. But there is no bar to retrial under *Burks* if the basis for a finding of insufficiency is a determination that some portion of the evidence was erroneously admitted. See *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978) (leaving open the issue). Thus, there would be no double jeopardy bar to retrial, regardless of the cor-

rectness of petitioner's claims on the merits. And if the Double Jeopardy Clause does not even potentially bar retrial, there is no right to interlocutory appeal under *Abney*.

2. Even aside from petitioner's reliance on a supposed trial error in admission of evidence, it is manifest that petitioner's retrial at this juncture would not be in violation of the Double Jeopardy Clause. The aspect of double jeopardy protection relevant here is the "protect[ion] against a second prosecution for the same offense after acquittal." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). *Burks* prohibited retrial after an appellate finding of insufficiency of the evidence precisely because such a finding is functionally equivalent to a judgment of acquittal entered by a trial judge or jury. 437 U.S. at 11. Here there has been no judgment of acquittal, and no functional equivalent of it. There has been only a mistrial, followed by a determination that the government's evidence was legally sufficient to support a conviction. Under these circumstances, no right of petitioner's would be violated by retrial; he has, therefore, no right to interlocutory appeal.

C. Accordingly, it is not surprising that every court of appeals to have considered the issue has rejected the interlocutory appealability of claims of insufficiency of the evidence after mistrials, even though coupled with assertions of double jeopardy. They have done so on the theory either that the issue is noncollateral, or that no colorable claims of double jeopardy had been raised, or both.

D. Pratical considerations strongly militate against extending a right of interlocutory appeal in this category of cases. The disruptive effect of piecemeal appeals, especially in the criminal context, has often

been noted by this Court. Requiring appellate review of the sufficiency of the evidence in cases ending in a mistrial after the close of the government's case would be particularly disruptive, because a claim of evidentiary insufficiency is available to any defendant in any case, and because the necessity of appellate review of the full record would make the use of summary procedures by the courts of appeals virtually impossible. The public's interest in efficient administration of justice outweighs any double jeopardy interest that might be safeguarded by an immediate appeal.[3]

---

[3] On December 6, 1983, this Court heard arguments in *Justices of the Boston Municipal Court* v. *Lydon*, No. 82-1479. *Lydon* involves several issues similar to the issues in this case; however, there are significant differences which make the outcome in *Lydon* unlikely to be dispositive of this case, even if decided in favor of the respondent. Most significant is that in *Lydon* the Commonwealth seeks to retry the defendant after he has received a judgment of conviction, and the issue is the constitutionality of the Commonwealth's procedure, including the adequacy of notice to the defendant. Here, by contrast, there has been no judgment—whether conviction or acquittal—and the issue is the nonconstitutional question of the right to or timing of appeal. The issues of habeas jurisdiction and consent are also absent in the instant case.

## ARGUMENT

### THE COURTS OF APPEALS DO NOT HAVE JURISDICTION TO ENTERTAIN INTERLOCUTORY APPEALS CHALLENGING THE SUFFICIENCY OF THE PROSECUTION'S EVIDENCE AT A TRIAL THAT TERMINATED WITHOUT A VERDICT

#### A. The District Court's Order Under Challenge Is Not Appealable Because It Does Not Satisfy The Criteria For The Collateral Order Doctrine; The Issues Are Not Collateral To, And Separable From, The Merits Of The Case

Petitioner contends that, under *Abney* v. *United States*, 431 U.S. 651 (1977), and *Burks* v. *United States*, 437 U.S. 1 (1978), he was entitled to immediate appellate review, prior to retrial, of the sufficiency of the prosecution's evidence in his first trial, in order to avoid being placed in double jeopardy. The question is whether there is a basis for such appellate jurisdiction. We agree with the court of appeals that there is not.

If petitioner has a right of appeal, it is to be found in statute, not in the Double Jeopardy Clause itself. For, as this Court reiterated in *Abney*, 431 U.S. at 656, "there is no constitutional right to an appeal." See *McKane* v. *Durston*, 153 U.S. 684 (1894). Other sources of appellate jurisdiction being unavailable, petitioner must come within the scope of 28 U.S.C. 1291, which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts."

Section 1291 by its terms embodies the firm congressional policy against interlocutory or "piecemeal" appeals by requiring finality of judgment as a predicate for federal appellate jurisdiction. In criminal cases especially, this Court has repeatedly emphasized

the special importance of the final judgment rule. *E.g.*, *Abney*, 431 U.S. at 657; *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). The district court's order denying petitioner's motion to bar retrial cannot be considered "final" in the sense of terminating the proceedings; indeed, the only consequence of the order is to permit the prosecution to continue.[4]

Petitioner relies, as he must, on the "collateral order" doctrine, under which certain orders are treated as "final decisions" within the meaning of Section 1291 despite the fact that they do not terminate an action. As defined in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the collateral order doctrine applies only to orders that meet three stringent criteria. First, the decision in question must conclusively determine the disputed issue; second, it must resolve an important question completely separate from the merits of the case; and third, it must involve an important right that would be lost, probably irreparably, if review awaited final judgment. *Id.* at 546; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).[5]

This Court has applied the collateral order doctrine sparingly in the criminal context. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

---

[4] " 'Final judgment in a criminal case means sentence. The sentence is the judgment.' " *Parr* v. *United States*, 351 U.S. 513, 518 (1956) (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937)).

[5] *Cohen* also established a fourth criterion—that the order must present "a serious and unsettled question" (337 U.S. at 547). The continued significance of this criterion was confirmed in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982).

In *Abney*, one of the three criminal cases in which the Court has permitted an interlocutory appeal,[6] the Court held that a defendant could seek immediate appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds. The Court found that the three requirements of the collateral order doctrine were satisfied. First, the order was a complete and final rejection, in the trial court, of the defendants' double jeopardy claim. 431 U.S. at 659. Second, the double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." *Ibid.* And finally, the right protected by the Double Jeopardy Clause, the Court held, "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660. Postponing review until final judgment would expose the defendant to a second trial—one of the evils the Double Jeopardy Clause was intended to prevent.

Petitioner would expand the reach of *Abney* to cases involving a mistrial or the grant of a new trial, to permit the interlocutory review of any issue that might have justified a judgment of acquittal in the first trial. He reaches that conclusion (Br. 9-16) by means of a broad interpretation of *Abney* as permitting the appeal of *any* order challenged under a theory implicating the Double Jeopardy Clause, whether

---

[6] The other two cases were *Stack* v. *Boyle*, 342 U.S. 1 (1951), which involved an order denying a motion to reduce bail, and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), which involved a claim of immunity under the Speech or Debate Clause.

or not it satisfies the criteria under the collateral order doctrine.

*Abney* did not cut so broad a swath. It concerned the appealability of a motion to dismiss based on the pure legal issue of the effect of a prior judgment on the permissibility of retrial. The defendants in *Abney* claimed that the jury's verdict in their first trial, reversed on appeal, could be read as an acquittal on charges brought against them in their second trial. In holding that the district court order rejecting their claim was appealable, this Court found that the order satisfied each of the criteria for the "collateral order" exception as set forth in *Cohen*. 431 U.S. at 658-662. Most pertinent to this case is the Court's finding with regard to the second *Cohen* requirement, that "[t]he elements of [Abney's] claim are completely independent of his guilt or innocence." 431 U.S. at 660.

The double jeopardy claim here, in contrast, depends entirely on petitioner's assertion that the evidence was legally insufficient. But as the court of appeals concluded (Pet. App. 5a), the question of evidentiary insufficiency is "anything but collateral to the merits of the upcoming trial." [7] The district court's

---

[7] We acknowledge that the district court's denial of petitioner's motion to dismiss had the requisite conclusiveness—that it did not leave the issue "open, unfinished, or inconclusive" (*Cohen*, 337 U.S. at 546). We will also assume, for purposes of our argument in this part, that the order below "involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment" (*Abney*, 431 U.S. at 658) (quoting *Cohen*, 337 U.S. at 546). However, as we further argue below, we do not believe that petitioner has raised a valid double jeopardy claim at all, so that, on that basis, the third *Cohen* requirement is also missing.

ruling that the government had presented sufficient evidence to support a guilty verdict is a classic example of a pretrial order that is "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). Rather than being "completely independent of [the issue of] guilt or innocence" (*Abney*, 431 U.S. at 660), the challenged order relates directly and exclusively to the merits of the prosecution.[8] As the Fifth Circuit explained in *United States* v. *Rey*, 641 F.2d 222, 225, cert. denied, 454 U.S. 861 (1981) (quoting *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981)):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is

---

[8] Petitioner frankly concedes (Br. 13) that the insufficiency issue "traverses the merits of the prosecution." However, suggesting that the insufficiency question performs a dual role in this case—both "generating the double jeopardy issue" and determining "whether or not the double jeopardy violation has been proven" (Br. 13-14)—petitioner argues that the "more visible but subordinate factual role" (Br. 14) should be disregarded in favor of the former role. Whether or not this formulation of the problem makes any sense in the abstract, it is clearly contrary to *Cohen* and finds no support in the decisions of this or—so far as we can tell—any other court. *Cohen* was based on the common sense notion that an issue that has nothing to do with the merits of the case and will not be reviewable upon final judgment, but that has serious and irremediable consequences, should be reviewed immediately. Petitioner's theory, if we understand it, would permit review of even undeniably noncollateral orders, if those orders have irremediable consequences. In effect, petitioner would reduce the collateral order doctrine to a one-part test, eliminating, inter alia, the criterion that gives it its name. See Br. 16.

> that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

Accord, *State* v. *Seravalli*, 189 Conn. 201, 455 A.2d 852, 855-856 (1983); *United States* v. *Ellis*, 646 F.2d 132, 134 (4th Cir. 1981).[9]

Petitioner focuses (Br. 15) on the Court's statement in *Abney* that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial" (431 U.S. at 659). But this statement, taken in context, does not mean that any claim characterized as a double jeopardy claim "*automatically* satisfies the criteria for the collateral order exception" (Br. 15) (emphasis in original). To the contrary, in the very next sentence the Court noted that "the defendant makes no challenge whatsoever to the merits of the charge against him" (431 U.S. at 659), and it later stated that "the matters embraced in the trial court's pretrial order here are

---

[9] To be noncollateral, an issue need not be identical to the question on the merits of the case; it suffices that it is "enmeshed" in the merits. *Firestone Tire & Rubber Co.*, 449 U.S. at 377. See also *Parr* v. *United States*, 351 U.S. 513 (1956). For example, the question of prejudice to the defense from delayed trial is a noncollateral issue, because it is ordinarily "intertwined" with the events at trial. *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978). That the sufficiency of the evidence is a noncollateral issue is even more clear.

truly collateral to the criminal prosecution itself in the sense that they will not 'affect, or . . . be affected by, decision of the merits of this case' " (*id.* at 660, quoting *Cohen*, 337 U.S. at 546). This Court thus made it clear in *Abney* that it was not creating a new exception to the final judgment rule, available to all claims characterized as double jeopardy claims; it was simply applying the established three-part *Cohen* test to the double jeopardy claim at issue in *Abney*.[10]

In other contexts, the notion that denial of a motion to acquit on grounds of insufficient evidence might be appealable under 28 U.S.C. 1291 would seem farfetched, to say the least. Denial of a motion to acquit is nonappealable for the same reason denial of a motion for summary judgment is nonappealable: the issues go to the merits of the case and will be merged in the judgment. See *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); cf. *Cephus* v. *United States*, 324 F.2d 893, 895 (D.C. Cir. 1963); *Gilmore* v. *United States*, 264 F.2d 44 (5th Cir.), cert. denied, 359 U.S. 994

---

[10] Petitioner relies heavily (Br. 12) on language in the *Abney* opinion stressing that the Double Jeopardy Clause guarantee against being put twice to trial for the same offense would be undermined if the accused were not permitted an appeal before the second trial. But this section of the *Abney* opinion was addressed solely to the third prong of the *Cohen* analysis—whether the decision sought to be reviewed involved an important right that could be " 'lost, probably irreparably,' " if review had to await final judgment (*Abney*, 431 U.S. at 658, 660-662). The Court concluded that this requirement was satisfied. Nonetheless, the Court considered it necessary to examine the remaining *Cohen* factors as well.

(1959). But a claim of insufficiency of the evidence does not become amenable to interlocutory review merely by being linked to a claim of double jeopardy. It remains a noncollateral order; the appellate court would still be called upon to evaluate issues enmeshed in the merits of the case.

This Court has held that double jeopardy claims may not be used as a means for obtaining pendent appellate jurisdiction over rulings that would not otherwise be appealable. *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978). The Court explained in *Abney* that the considerations that justify appealability of the double jeopardy issue "do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." 431 U.S. at 663. Since the order in this case does not "fall within *Cohen*'s collateral-order exception" on its own terms, it does not become appealable by association with a claim of double jeopardy.

Although, as this case illustrates, not all claims characterized as double jeopardy claims are collateral to the merits, it may well be that all true double jeopardy claims, strictly understood, are. Of the three traditional categories of double jeopardy claim (see *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)), the first—"protect[ion] against a second prosecution for the same offense after acquittal" (*ibid.*), of which *Abney* is an example—is inherently a collateral issue

because it involves solely the legal issues of the meaning of the prior judgment and its relation to the subsequent indictment. It has nothing to do with guilt or innocence. The second—"protect[ion] against a second prosecution for the same offense after conviction" (395 U.S. at 717)—involves the same type of legal analysis and is inherently collateral for the same reason. The third—"protect[ion] against multiple punishments for the same offense" (*ibid.*)—will arise only on final judgment. And the more recent addition to double jeopardy protections—protection of the "valued right to have [one's] trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689 (1949); *Crist* v. *Bretz*, 437 U.S 28, 33-36 (1978))—will also generally present a collateral issue unrelated to the defendant's guilt or innocence: whether the first trial was properly aborted, an issue usually phrased as one of "manifest necessity." See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497 (1978); *United States* v. *Jorn*, 400 U.S. 470 (1971).[11] Thus, if the double jeopardy claim falls within one of these basic categories, it will either

---

[11] In *United States* v. *Scott*, 437 U.S. 82, 92 (1978), this Court observed that the defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made" can be involved in two different situations. The first—declaration of a mistrial—is discussed in text. The second—termination of a proceeding by the trial court in the defendant's favor on a basis not related to factual guilt or innocence—constitutes a final judgment and therefore has no bearing on the scope of *Abney*.

arise on final judgment or present a collateral issue and thus be appealable under *Abney*.

As discussed in Point B, we do not believe petitioner's claim is one of double jeopardy at all, at least at this juncture; in any event, it is not one of the established types of double jeopardy claim that this Court was considering when it described double jeopardy claims as collateral by their "very nature" (*Abney*, 431 U.S. at 659).[12] The court of appeals was therefore correct in rejecting petitioner's argument that the principle of *Abney* should be extended to permit appeal of the district court's order.

---

[12] This analysis of *Abney* is bolstered by the three court of appeals decisions cited by the Court in support of its holding (431 U.S. at 657). *United States* v. *Barket*, 530 F.2d 181 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976), like *Abney*, involved the traditional double jeopardy issue of the effect of a final judgment in the first trial upon reprosecution on a similar charge in the second trial. *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), and *United States* v. *Lansdown*, 460 F.2d 164 (4th Cir. 1972), involved the more recently recognized—but still collateral—issue of whether the trial court erroneously caused a mistrial by too hastily declaring the jury deadlocked. None of these lower court decisions cited by the *Abney* Court involved claims, such as insufficiency of the evidence, that "go[] to the very heart of the issues to be resolved at the upcoming trial" (*Abney*, 431 U.S. at 663). Indeed, in *Lansdown*, 460 F.2d at 171 n.8, the Fourth Circuit carefully distinguished the case from another in which the motion to dismiss on double jeopardy grounds would be more closely intertwined with the merits of the case.

### B. The District Court's Order Is Not Appealable Under *Abney* Because Petitioner Has Not Raised A Potentially Valid Double Jeopardy Claim

To obtain an interlocutory appeal under *Abney* it is not enough for a defendant simply to assert that he is raising a double jeopardy claim. His claim of double jeopardy must at least be colorable. *MacDonald*, 435 U.S. at 862; see *Abney*, 431 U.S. at 662 n.8, 663; *Ellis*, 646 F.2d at 134.[13] At this juncture in the proceedings, there is no possibility that petitioner's double jeopardy rights would be violated by a new trial. The court of appeals was therefore correct to dismiss the appeal for want of jurisdiction.[14]

---

[13] We interpret the term "colorable" in this context as excluding claims that, by their nature, are not and could not be valid double jeopardy claims. The term encompasses claims that are potentially valid, and that depend for their validity on the particular facts and circumstances of the claim. Merely because a claim may involve a close question of law does not make it "colorable" if—upon resolution of the legal issue—it is invalid no matter what its factual particulars may be. See *United States* v. *Head*, 697 F.2d 1200, 1204-1207 (4th Cir. 1982), cert. denied, No. 82-1655 (June 20, 1983).

[14] Petitioner asserts, without support, that the United States "concedes that petitioner has raised a valid double jeopardy claim" (Br. 6; see *id.* at 16). We do not. In our view, petitioner would have a valid double jeopardy claim only if the government attempted to retry him after a judicial determination had been made that the evidence at his first trial was insufficient. *Burks*, 437 U.S. at 18. As we pointed out in our Brief in Opposition (at 10), no such determination has been made. Moreover, we do not concede that the evidence at petitioner's first trial was insufficient. See *id.* at 13 n.11. The only judicial determination on the sufficiency issue was that the evidence was sufficient. J.A. 4a.

**1. Petitioner's retrial presents no double jeopardy problem if the evidence against him can be deemed insufficient only after discounting portions of the government's evidence**

Petitioner does not in fact make a true *Burks*-type claim of evidentiary insufficiency—that is, he does not argue that the government's case was insufficient when all the evidence admitted by the trial court is taken into consideration.[15] Rather, he bases his claim of insufficiency of the evidence on the theory (Br. 17) that all hearsay statements made by petitioner's co-conspirator should be "exclude[d] from consideration" and that the remaining evidence could not support conviction. He contends that there was an inadequate basis laid for the admission of co-conspirator declarations under *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); see Fed. R. Evid. 801(d)(2)(E).

Petitioner's effort to secure interlocutory review by classifying his claim under the double jeopardy rubric thus encounters a threshold obstacle. In *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), this Court expressly left open the question whether double jeopardy would bar a retrial following a reversal of conviction, where some of the prosecution's evidence was found to have been erroneously admitted, and the remaining, legally competent evidence was insufficient to support the conviction. Since *Greene* v. *Massey*, *supra*, every court of appeals to consider the question has held that such a finding is not a bar to retrial. *United States* v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), petition for cert. pending, No. 83-

[15] Among the evidence petitioner would exclude from consideration are statements by Leroy Cooper strongly implicating him in the scheme. See I Tr. 33, 190-191, 191-192, 192-193.

5063; *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir. 1982) (per curiam), cert. denied, No. 81-2286 (Oct. 4, 1982); *United States* v. *Chesher*, 678 F.2d 1353, 1357-1359, 1364 (9th Cir. 1982); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980); *United States* v. *Mandel*, 591 F.2d 1347, 1371-1374, vacated en banc on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); accord, *State* v. *Longstreet*, 619 S.W.2d 97, 100-101 (Tenn. 1981).

This case thus provides an opportunity to resolve the issue left open in *Greene* v. *Massey*, *supra*—an issue of considerable practical importance because of the relative frequency of reversals of convictions on the basis of improper admission of evidence. We submit that the appellate decisions upholding the government's right to retry a defendant where a crucial part of the evidence is subsequently held to have been erroneously admitted, leaving the remainder of the evidence insufficient to support a conviction, were correctly decided. A finding of insufficiency under those circumstances is not tantamount to a judgment of acquittal, but is merely a finding of trial error. As the Court stated in *Burks*, reversal based on trial error represents merely "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect," such as the "incorrect receipt or rejection of evidence * * * [;] it implies nothing with respect to the guilt or innocence of the defendant." 437 U.S. at 15. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964):

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to consti-

tute reversible error in the proceedings leading to conviction.

See also *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

Where the totality of the government's evidence is found to be insufficient, the government has had its "one complete opportunity to convict those who have violated its laws" (*Arizona* v. *Washington*, 434 U.S. at 509); it is not entitled to another. Where, however, evidence held to be admissible at trial is later deemed inadmissible, it is neither overreaching nor oppressive to allow the government an opportunity to proceed again, this time under correct rules of law. The government's error is indistinguishable from any other trial error, where the permissibility of retrial would not be in doubt under *Burks*.

If the trial court's error (assuming arguendo that it was error) in admitting the co-conspirator's hearsay statements as evidence against petitioner had been corrected at trial, the government would have had the opportunity to supplement its case and remedy the evidentiary defects. The evidence actually introduced by the government "[did] not necessarily reflect all other available evidence of the defendant's involvement. It is impossible to know what additional evidence the government might have produced had the faulty evidence been excluded at trial, or what theory the government might have pursued had the evidence before the jury been different." *Harmon*, 632 F.2d at 814; see *Sarmiento-Perez*, 667 F.2d at 1240. To deny the government the right to retry would place the government at its peril in relying on trial court evidentiary decisions, and would jeopardize the retrial of numerous defendants whose con-

victions have been reversed for erroneous admissions of evidence.

The courts of appeals have recognized substantial reasons of policy militating against barring retrials in these circumstances. As the Seventh Circuit observed in *Tranowski*, 702 F.2d at 671:

> A contrary conclusion would lead the government to "overtry" its cases—to introduce redundant evidence of the defendant's guilt—in order to insure itself against the risk of not being able to retry the defendant should some of its evidence be held on appeal to be inadmissible. It would also require the court of appeals, in every case where it reversed a conviction because of erroneous admission of evidence, to determine the sufficiency of the remaining evidence—something the court would otherwise be required to do only if the government argued harmless error.[16]

And the Ninth Circuit has pointed out that barring retrials in these circumstances would injure the

---

[16] Some courts have held, after *Burks*, that the reviewing court is required to decide whether the evidence was sufficient even where there might be other grounds for reversal that would not preclude retrial. See *United States* v. *Orrico*, 599 F.2d 113, 116 (6th Cir. 1979); *United States* v. *Till*, 609 F.2d 228, 229 (5th Cir.), cert. denied, 445 U.S. 955 (1980); *United States* v. *Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978); *United States* v. *Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980); *United States* v. *Vargas*, 583 F.2d 380, 383 (7th Cir. 1978); *United States* v. *McManaman*, 606 F.2d 919, 927 (10th Cir. 1979); *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), cert. denied, 444 U.S. 884 (1979). Whether or not such determinations are required as a matter of law, it is clear that to expand the bar against retrial to cases involving the erroneous admission of evidence would vastly increase the frequency and complexity of appellate evaluations of the sufficiency of the evidence.

rights of defendants as well as the government (*Harmon*, 632 F.2d at 814 (quoting *Tateo*, 377 U.S. at 466)):

> [I]t is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Since retrial should not be barred even if an appellate court were to find that the evidence in this case was insufficient under petitioner's theory, there is no right to an appeal under *Abney*, quite apart from the fact that any claim of evidentiary insufficiency following a mistrial is wholly noncollateral, as discussed in Part A. Petitioner's type of "insufficiency" claim simply does not give rise to a right against retrial under the Double Jeopardy Clause, as interpreted in *Burks*, *Greene*, and subsequent appellate decisions.

**2. There is no double jeopardy bar to retrial of petitioner in the absence of a judicial determination that the evidence at his first trial was insufficient**

Even if petitioner were making a conventional claim of evidentiary insufficiency, or if we are wrong in supposing that his claim of residual insufficiency presents no double jeopardy issue, he still fails to present a double jeopardy claim.

Petitioner does not contend that his double jeopardy rights would be violated by a retrial merely because his first trial resulted in a hung jury. Nor could he. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982);

*Arizona* v. *Washington*, 434 U.S. at 509; *United States* v. *Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Downum* v. *United States*, 372 U.S. 734, 735-736 (1963); *Wade* v. *Hunter*, 336 U.S. at 689; *Keerl* v. *Montana*, 213 U.S. 135 (1909); *Dreyer* v. *Illinois*, 187 U.S. 71, 84-86 (1902); *Logan* v. *United States*, 144 U.S. 263, 298 (1892); see *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). Petitioner argues, instead, that retrial would violate his right under *Burks* not to be retried following a judicial determination that the evidence in his first trial was insufficient to support a conviction. Since there has been no such determination in this case, however, petitioner's claim has no foundation.

*Burks* was simply an application of the principle —having its origin in the common law plea of *autrefois acquit* [17]—that a person may not be retried for the same offense following a judgment of acquittal. 437 U.S. at 5. This is one of the three traditional double jeopardy protections identified in *North Carolina* v. *Pearce*, 395 U.S. at 717. As this Court stated in *Burks* (437 U.S. at 10-11 (citations and footnote deleted; emphasis in original)):

> By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, [the court of appeals] was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be re-

[17] See *United States* v. *Scott*, 437 U.S. 82, 87 (1978); J. Sigler, *Double Jeopardy* 8, 16-21 (1969); see also *id.* at 2-3 (precursors in Roman and canon law).

> tried for the same offense. Consequently, * * * it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient.

Petitioner apparently reads *Burks* to mean that the asserted failure of the prosecution to produce sufficient evidence at the first trial would, in and of itself, bar retrial under the Double Jeopardy Clause.[18] However, a careful reading of *Burks* demonstrates that the Court held only that a *judicial determination* of insufficiency—*i.e.*, the equivalent of a judgment of acquittal—bars retrial. The *Burks* Court itself summarized its holding as follows (437 U.S. at 18):

> [W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.[19]

---

[18] See Br. 13 ("insufficient evidence resulting in a hung jury does not permit the Government another chance to secure a conviction"); see also Pet. 4, 7.

[19] Similarly, in *Greene* v. *Massey*, 437 U.S. at 24, the Court restated the *Burks* holding:

> In *Burks* v. *United States*, * * * decided today, we have held that the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict.

And in *United States* v. *Scott*, 437 U.S. at 91 (footnote omitted), the Court, citing *Burks*, stated:

> A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, * * * terminates the prosecution when a second trial would be necessitated by a reversal.

We have found no decision of this Court suggesting any double jeopardy bar to retrying a defendant because insufficient evidence had been presented at the first trial, in the absence of a prior judicial determination to that effect.

The holding in *Greene* v. *Massey*, *supra*, provides further confirmation that this interpretation of *Burks* is correct. In *Greene*, the Court considered the effect of a Florida Supreme Court decision reversing a criminal conviction, made apparently—but not unambiguously—on grounds of insufficiency of the evidence. The Court ultimately remanded to the court of appeals, which would be in a better position to interpret the Florida ruling. 437 U.S. at 26-27. But if petitioner's reading of *Burks* were correct, then the actual *holding* of the Florida Supreme Court would be irrelevant; the dispositive question would be whether the evidence at the first trial had in fact been insufficient. That the Court did not consider the question of actual insufficiency at all in *Greene*, or suggest that the court of appeals do so on remand, confirms that the right not to be retried under *Burks* arises solely as a result of judicial determinations of insufficiency—not mere failures of proof by the government. See also *Hudson* v. *Louisiana*, 450 U.S. 40, 44 (1981). This is the key to the instant case, because here there has been no judicial determination of insufficiency—and therefore no double jeopardy claim on which to base an appeal under *Abney*.[20]

---

[20] For example, if in this case the government attempted to retry petitioner on Count 2, on which the jury found him not guilty, petitioner could appropriately move to dismiss, pleading a prior acquittal. And if the trial court were to deny that motion, its order would be immediately appealable under *Abney*. Having a prior *determination* of not guilty, petitioner would clearly have a valid double jeopardy claim. *United States* v. *Ball*, 163 U.S. 662, 669 (1896). He would also have a valid double jeopardy claim if the district court had granted his motion for judgment of acquittal but then proceeded to retry him. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The surface plausibility of petitioner's argument arises chiefly from the observation that, had the district court found the evidence at the first trial to be insufficient, the prosecution would have been terminated. Why, petitioner asks in effect, should he not have an opportunity to obtain the same result from an appellate court? But the sequence of events makes all the difference. An *Abney* appeal safeguards the defendant's right not to be retried where an order has been entered that would not permit of retrial under the Double Jeopardy Clause—be it an unreversed conviction, an acquittal, an unnecessary mistrial opposed by the defendant, or the functional equivalent of any of these. Neither 28 U.S.C. 1291 nor any other provision of law provides a right of appeal to *obtain* such an order, if the question is interlocutory and does not itself satisfy the collateral order doctrine. Merely because interlocutory review, if it took place and if it resulted in a decision favorable to the defendant, would have double jeopardy consequences does not mean that an appeal is available. The appealability question hinges on the nature of the order under review—not on whether double jeopardy consequences would flow from an appellate judgment favorable to the defendant.

Our point may seem clearer in the context of habeas corpus review of state decisions to retry a defendant after mistrial or reversal of a conviction.[21] *Delk* v. *Atkinson*, 665 F.2d 90 (6th Cir. 1981), is closely analogous to the instant case, but arose in state court. The defendant in *Delk* was convicted,

---

[21] *Burks* was applied in the habeas context in *Greene* v. *Massey*, *supra*, and *Hudson* v. *Louisiana*, *supra* (state habeas review).

and his conviction was reversed by the state supreme court for trial error. The state supreme court also expressly considered and rejected the defendant's claim that the evidence at trial was legally insufficient, and remanded for retrial. *Delk* v. *State*, 590 S.W.2d 435 (Tenn. 1979). Prior to retrial, the defendant sought habeas corpus relief in the federal district court, on essentially the same argument made by petitioner here: that the Double Jeopardy Clause bars retrial of a defendant where the government had failed to introduce legally sufficient evidence of guilt at the first trial. Finding the evidence insufficient, the district court issued the writ and prohibited retrial. 498 F. Supp. 1282 (M.D. Tenn. 1980). Although it reversed on the merits (665 F.2d at 94-100), the Sixth Circuit upheld the jurisdiction of the district court, holding that "when a state reviewing court specifically finds the evidence sufficient to support a conviction but reverses on other grounds and orders a new trial, the defendant may seek to prevent a retrial on double jeopardy grounds by bringing a federal habeas corpus proceeding after state remedies have been exhausted" (*id.* at 93) (footnote omitted).[22]

We of course disagree with *Delk*'s holding, which parallels petitioner's argument here. We describe it because it illuminates the flaws in this approach to

---

[22] The court based its holding on this Court's decisions in *Burks* and *Jackson* v. *Virginia*, 443 U.S. 307 (1979). "[I]f the evidence at the prior trial was actually insufficient under the standard of *Jackson* v. *Virginia*, the defendant should have been acquitted, and to expose him to a second trial on the same charge would appear to be a violation of the prohibition against double jeopardy." 665 F.2d at 92. Like petitioner, the *Delk* court did not consider the lack of a judicial determination of insufficiency to be significant.

the issue. Obviously, if adopted generally, *Delk*'s assumption of habeas corpus jurisdiction would play havoc with the states' ability to retry defendants.[23] The problem is the same—only somewhat less acute—where the question is appealability rather than habeas review.[24] In both instances the government's interest in prompt retrial will be frustrated. And in both instances the flaw in the logic is a failure to confine *Burks* to judicial determinations of insufficiency. To expand *Burks* to create additional layers of appellate review on the basis of a mere assertion—rather than a determination—of insufficiency would needlessly enmesh appellate courts in piecemeal review of the merits of ongoing prosecutions.

In sum, petitioner's argument confuses the effect to be given a reviewing court's finding of insufficiency with the right to have such a determination made. *Burks* does not address the question of appealability, but only the *effect* of a judgment by an appellate

---

[23] The First Circuit posed the problem in *Lydon* v. *Justices of the Boston Municipal Court*, 698 F.2d 1, 6 (1982), cert. granted, No. 82-1479 (June 27, 1983):

> [W]ere such review generally available, it might create practical problems when a defendant convicted in a state court appeals, alleging "evidence insufficiency" as one of a number of grounds for reversal. The state appellate courts may well reject the "evidence insufficiency" claim, yet order a retrial on other grounds. Can the defendant in such a case then force the state to run the gauntlet of federal habeas proceedings on the "evidence insufficiency" issue prior to his state retrial? Can he obtain delay of the retrial, regardless of the merits of his claim, and thereby, through elapsed time and fragile memory, reduce his chances of subsequent conviction?

[24] The problem will also arise more often in the *Delk* context, which involves reversals of convictions as well as (presumably) mistrials.

court having jurisdiction to review the sufficiency of the evidence. And under *Abney*, only a defendant with a colorable claim of double jeopardy—which petitioner does not now have—has a right to appeal an order permitting retrial. The court of appeals was therefore correct that, having no jurisdiction to review petitioner's insufficiency of evidence claim, it also lacked jurisdiction under *Abney* to review petitioner's empty claim of double jeopardy.[25]

---

[25] We do not believe this Court needs to resolve the issue debated between the majority and the dissent in the court below, *viz.*, whether a court of appeals could reverse a conviction on retrial on the basis of insufficient evidence in the first trial. Following the statements—even if not holdings (see Pet. App. 29a-30a)—of several courts of appeals (*United States* v. *Balano*, 618 F.2d 624, 632 n.13 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980) (holding directly on point); *United States* v. *Bodey*, 607 F.2d 265, 267-268 (9th Cir. 1979); *United States* v. *Wilkinson*, 601 F.2d 791, 794-795 (5th Cir. 1979), we conceded in the court of appeals and in our Brief in Opposition (at 7 n.5), that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient. Upon further study, we have come to question whether this is necessarily so. Prior to *Burks*, such a finding would not have constituted grounds for reversal. *Bryan* v. *United States*, 338 U.S. 552 (1950). *Burks* itself did not, of course, bear on this precise issue. However, *Greene* v. *Massey*, *supra*, while not dispositive, suggests that the issue of *actual* insufficiency of the evidence at trials where the conviction is reversed is not material to the review of a subsequent conviction. See page 27 *supra*. And *United States* v. *Sanford*, 429 U.S. 14 (1976), suggests that after a proper mistrial is declared (and post-trial Rule 29 motions denied, see *United States* v. *Martin Linen Supply Co.*, *supra*), a new trial is not viewed as a successive prosecution for double jeopardy purposes. In effect, these cases suggest that mistrials wipe the slate clean—the position espoused by Judge Scalia in dissent below. See Pet.

### C. The Decision Below Is Consistent With Every Other Court Of Appeals Decision On This Issue

Every court of appeals that has considered the precise issue presented in this case since *Abney* has found that a trial court's denial of a motion for judgment of acquittal after a mistrial, even though coupled with a claim that retrial would be barred by double jeopardy, is not immediately appealable. Each of these decisions is based either on the ground that no colorable double jeopardy claim had been raised at the time of appeal, or that the claim is not collateral to the merits of the case, or both. *United States* v. *Ellis*, 646 F.2d at 134-135; *United States* v. *Rey*, 641 F.2d at 225; *United States* v. *Becton*, 632 F.2d at 1297; *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *State* v. *Seravalli*, 189 Conn. 201, 455 A.2d 852 (1983); *Rafferty* v. *Owens*, 82 A.D.2d 582, 584-585, 442 N.Y.S.2d 571 (1981).

These decisions, like the instant case, are clearly distinguishable from cases involving the timing of subsequent appeals after an initial final judgment has

---

App. 30a. In any event, resolution of this issue would not affect the outcome of this case, since under neither approach can there be a review of the sufficiency of the evidence by a court of appeals at this juncture.

We see no merit in Judge Scalia's further suggestion (Pet. App. 16a-21a, 31a) that petitioner has a right to appeal even though his claim of double jeopardy is invalid on its face. Nothing but mischief is accomplished by the vain act of a notice of appeal—with attendant disruption of trial court proceedings—if the appeal is foreordained to be rejected. Such a result, we submit, is precisely what this Court intended to avoid by limiting *Abney* appeals to colorable claims of double jeopardy.

been entered. See, *e.g.*, *United States* v. *Sneed*, 705 F.2d 745 (5th Cir. 1983); *United States* v. *McQuilkin*, 673 F.2d 681 (3d Cir. 1982);[26] *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981); *United States* v. *Jelsma*, 630 F.2d 778 (10th Cir. 1980); *United States* v. *United States Gypsum Co.*, 600 F.2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979). Although we do not endorse the reasoning or results of all of these decisions, their impact on judicial economy and the administration of justice is considerably less than would be caused by a right of interlocutory appeal here, where there has been no judgment in the trial court and no involvement by an appellate court in the process. In cases such as *McQuilkin* and

---

[26] Petitioner cites *McQuilkin* as presenting a contrary view. However, it is distinguishable because of its unusual procedural posture. In *McQuilkin* the defendants were convicted by a magistrate of contempt of an injunctive order. The district court, acting in an appellate capacity, reversed and remanded for a new trial, because the first trial was improperly conducted without a jury. The court also rejected the defendants' claim that the evidence before the magistrate was insufficient. Thus, *McQuilkin*, like the other cases cited in text, involved the question of appellate review after an initial final judgment of conviction had been entered.

To the extent that *McQuilkin* is seen as conflicting with the other court of appeals decisions on this issue (see Pet. App. 7a), we submit that its reasoning is defective, as it is based on an overbroad reading of both *Abney* and *Burks*. The court in *McQuilkin* read *Abney* as allowing interlocutory appeals of all double jeopardy claims because of "the nature of the right protected." 673 F.2d at 684. But as we noted above, that was only one of three factors the *Abney* Court considered; it examined all three criteria of the collateral order doctrine and found that all three were satisfied. The *McQuilkin* court also appears to have misread *Burks* in interpreting it to prohibit retrial even where no judicial determination of insufficiency had been made. 673 F.2d at 685.

*Sneed*, the appellate court can minimize the delay and burden by addressing the question of evidentiary sufficiency as part of the first appeal. Compare *Sneed*, (second appeal permitted before retrial to consider insufficiency claim), with *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir. 1982), cert. denied, No. 82-5010 (Nov. 1, 1982) (presuming that appellate court decided insufficiency claim, if raised, on initial appeal). By contrast, a right of appeal in the instant case would interfere with the ability of trial courts to schedule prompt retrials and would engender an additional layer of piecemeal review. Moreover, the entry of an initial final judgment is of doctrinal significance under the reasoning of *Abney* since the most fundamental value in double jeopardy cases (*e.g.*, *Tibbs* v. *Florida*, 457 U.S. 31 (1982); *Hudson* v. *Louisiana*, 450 U.S. 40 (1981); *Greene* v. *Massey*, 437 U.S. 19 (1978); *Abney* v. *United States*, *supra*) is the integrity of an earlier *judgment*.

**D. Extension Of *Abney* To Permit Appeals Of District Court Findings Of Sufficiency Of The Evidence After Mistrials Would Needlessly Disrupt The Efficient Administration Of The Criminal Justice System**

The final judgment rule embodied in 28 U.S.C. 1291 is a principle of sound judicial administration, consistently accorded a "practical rather than a technical construction." *Cohen*, 337 U.S. at 546. In interpreting its requirements, this Court has sought to balance the individual's interest in speedy rectification of alleged errors against the general public interest in prompt trials and judicial economy. Since the basic purposes of the final judgment rule are to prevent the "leaden-footed administration of justice" (*DiBella*, 369 U.S. at 124) and the "unjustified waste

of scarce judicial resources" (*Firestone Tire & Rubber Co.*, 449 U.S. at 378; see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)), the resolution of this case should take due account of the potential impact on the judicial process. Such a focus is particularly appropriate here, in the context of a criminal prosecution, where piecemeal review is "especially inimical to the effective and fair administration of the criminal law." *DiBella*, 369 U.S. at 126; see *Hollywood Motor Car Co.*, 458 U.S. at 265.

Appeals of orders upholding the sufficiency of the evidence after mistrial are troubling for two reasons. First, as Judge Scalia pointed out in his dissenting opinion (Pet. App. 27a), "[e]very hung jury would entitle the defendant to an immediate appellate determination of the sufficiency of the evidence." The problem is even broader than that. Since counsel for the defense ordinarily makes a motion to acquit for insufficiency of the evidence as a matter of course, petitioner's theory would in practice guarantee a right of interlocutory appeal, with attendant delay, in almost every prosecution in which there is a mistrial after the close of the government's case. Cf. *United States* v. *Brizendine*, 659 F.2d 215, 224 (D.C. Cir. 1981). This would wholly vitiate the traditional rule permitting retrial without appeal after a mistrial has occurred. Instead, the defendant would be given the option, in virtually every case, of postponing the proceedings in the trial court for the duration of appellate court review. Prompt retrials would become a virtual impossibility.[27]

---

[27] In this case, for example, the mistrial was declared on June 6, 1981, and retrial was scheduled the same day for September 14, 1981. Petitioner filed a notice of appeal on September 11, 1981, and retrial has not yet occurred.

Second, by the nature of a claim of insufficiency, appellate courts will be unable to dispose of these appeals summarily. For, as the court of appeals pointed out (Pet. App. 9a), "the sufficiency of the evidence [is] a legal issue which requires full review of the entire record created at the trial level." This is a particularly daunting prospect in the instance of hung juries, where it will often be the case that the evidence against the defendant was not overwhelming. Under petitioner's approach, the appellate court would be compelled to delve deeply into the factual intricacies of each case, only to find itself duplicating the process if the accused is retried and convicted. Thus the appellate court would be denied the economies and enhanced insight that flow from unitary review of all claims of error in a single proceeding.[28]

On the other hand, the double jeopardy interests implicated by retrying petitioner, and that might be safeguarded by extending him a right of interlocutory appeal, are unclear at best. The traditional protections against multiple punishments and retrial for the same offense after either acquittal or conviction (*North Carolina* v. *Pearce*, 395 U.S. at 717) are not pertinent here, because there has been no prior conviction or acquittal. Nor, it would appear, is petitioner's "valued right to have his trial completed by

---

[28] Significantly, the decision in *Abney* was predicated in part on the expectation that the problem of dilatory appeals could be "obviated by rules or policies giving such appeals expedited treatment" (431 U.S. at 662 n.8). This expectation may be realistic where the appellant raises a double jeopardy claim based on interpretation of a prior judgment, susceptible to rapid appellate screening and review. But it is questionable whether *Abney* was intended to apply to determinations requiring plenary review of the merits of the earlier proceeding.

a particular tribunal" at stake. See *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). This right is essentially the embodiment of "the interest of an accused in retaining a chosen jury." *Crist* v. *Bretz*, 437 U.S. at 35. But here the case went to petitioner's chosen jury, and the jury was unable to reach a verdict. Any benefit he might reap from this right petitioner has received.[29]

Of course, petitioner would prefer to go free rather than undergo the rigors of a second trial, with the attendant possibility of conviction; and that interest has been recognized by this Court as an aspect of the guarantee against double jeopardy. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. at 32-36; *Arizona* v. *Washington*, 434 U.S. at 503-505; *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). But it is an interest petitioner holds in common with every other defendant retried after a mistrial or a reversal of conviction. It has long been held that a defendant's right not to be tried a second time after a hung jury, as is involved in this case, is subordinate to the "interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction." *Illinois* v. *Somerville*, 410 U.S. 458, 463 (1973); see *Arizona* v. *Washington*, 434 U.S. at 505; *United States* v. *Perez*, *supra*.

This Court has recognized a right against retrial after a mistrial not opposed by the accused, but only where the error precipitating the mistrial was one that could be "manipulated * * * to allow the prosecution an opportunity to strengthen its case" (*Illinois* v. *Somerville*, 410 U.S. at 469), or, to put the

[29] Petitioner did not object to the discharge of the jury or the declaration of a mistrial (I Tr. 361).

point in different words, when there is "reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona* v. *Washington*, 434 U.S. at 508.[20] This is not such a case. It is difficult to imagine a less likely vehicle for manipulation than the presentation of insufficient evidence. It would be absurd for the government to hold back a part of its evidence—risking acquittal and increasing the cost and uncertainty of litigation—in a misguided attempt to get a "second bite at the apple" (*Burks*, 437 U.S. at 17).[21]

But if the alleged error is not one subject to manipulation, petitioner's right to have the case go to the original jury has been protected, there is no prior judgment of acquittal or conviction to bar retrial, and petitioner's remaining interest in not undergoing

---

[20] The right against retrial in the absence of a final judgment is considered less weighty than the right against retrial after acquittal or after an unreversed conviction, which is much closer to being absolute. See *United States* v. *Scott*, 437 U.S. at 91-92. This is not to say that "extreme cases," such as those involving prosecutorial manipulation, "mark the limits of the [double jeopardy] guarantee" against successive prosecutions in the absence of a judgment. *Downum* v. *United States*, 372 U.S. 734, 736 (1963); see *United States* v. *Jorn*, 400 U.S. at 485. However, the guarantee in this context is often found to be "subordinate" to the public's right of prosecution. See *Arizona* v. *Washington*, 434 U.S. at 505.

[21] Indeed, the more commonly perceived danger is that the government, reckoning its case to be weak, might commit error to provoke a mistrial, thereby winning a fresh opportunity to present a stronger case. It is difficult to see why the deliberate weakening of an otherwise strong case would be thought advantageous. In any event, there is no suspicion of manipulative conduct on the government's part here.

retrial is outweighed by the government's interest in prosecuting suspected crimes, then petitioner has no legitimate double jeopardy interest to be protected by an interlocutory appeal. By contrast, the administration of justice would be seriously affected by creation of a right to appeal—and to plenary and duplicative review of the full trial record by the appellate court—in virtually every case ending in a hung jury or other form of mistrial after the close of the government's case. The public's interest in the efficient administration of justice should therefore prevail. *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940).[22]

---

[22] If this Court were to reverse the court of appeals on the jurisdictional issue, we would urge the Court to remand to the court of appeals, which has not reached the merits of the case, rather than to accept petitioner's invitation (Br. 16-26) to determine the sufficiency of the evidence. In any event, the government's evidence at trial was sufficient to support a conviction. Petitioner's presence at the barber shop on October 21 (II Tr. 8), his conversation with Cooper just before Lee was to return for the heroin (I Tr. 191-193), his presence in the vicinity of the October 21 purchase (I Tr. 280-281; II Tr. 9-10), his clearly evasive actions (I Tr. 192-193, 280-281), his fingerprints on a package containing marketable quantities of heroin (I Tr. 106, 113-114, 189), and his use of an automobile also involved in the September 22 heroin sale (I Tr. 123; II Tr. 7-8), establish by a preponderance of the evidence (*United States* v. *Winter*, 663 F.2d 1120, 1140 (1st Cir. 1981), cert. denied, No. 81-1392 (Feb. 28, 1983)) that a conspiracy existed and that petitioner was a member of it. The acts and declarations of petitioner's co-conspirator, Cooper, implicating petitioner as a regular source of drugs and participant in the scheme (I Tr. 33, 190-191, 191-192, 192-193), complete the picture. Petitioner does not contend that the evidence was insufficient if the co-conspirator's statements are considered.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MICHAEL W. MCCONNELL
*Assistant to the Solicitor General*

KATHLEEN A. FELTON
*Attorney*

DECEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 420004 203

No. 82-2113

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF FOR PETITIONER ON THE MERITS

Allan M. Palmer
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
Robert D. H. Richardson

January, 1984

Casillas Press, Inc. - 1717 K Street NW, Washington DC - 223-1220

## TABLE OF CONTENTS



## TABLE OF CASES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 82-2113

---

ROBERT D. H. RICHARDSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## REPLY BRIEF FOR PETITIONER ON THE MERITS

---

### I

### REPLY TO BR. 24-31

The filing of petitioner's brief on the merits has caused the Solicitor General to suddenly abandon a significant concession initially made in the court of appeals and repeated here.

> "[W]e conceded in the court of appeals and in our Brief in Opposition (at 7 n. 5), that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient. Upon further study we have come to question whether this is necesarily so." (Br. 31 n. 25)[1]

We find untenable the government's related claim that it does not fully comprehend the implication of that concession. *E.g.*, at Br. 19 n. 14 the government disputes our assertion that it "concedes that petitioner has raised a valid double jeopardy claim (Br. 6, see *id.* at 16)," as one made "without support." Certainly, at least one in the array of government counsel fully understands that this assertion squarely rests upon the withdrawn concession — a relationship we have specifically traced at Br. 9-10. To repeat, *if as conceded,* the conviction obtained at the second trial must be reversed, that trial is violative of petitioner's right not to be twice placed in jeopardy and should never occur. Since petitioner is not required to run the gauntlet a second time if his insufficiency claim concerning the first trial is correct, he has *a fortiori* raised a *concededly* valid, enforceable double jeopardy claim.[2]

---

[1]Additionally — as the tapes will confirm — government counsel made the same concession at oral argument in the court of appeals.

[2]The government's alleged failure to grasp that our assertion was grounded in its withdrawn concession, completely deteriorates when we next consider petitioner's Reply to the Government's Brief in Opposition. In the opening paragraph we find:

> "At note 5 thereof (Br. 7) appears the concession that if petitioner were convicted at a retrial, such conviction must be reversed if 'the evidence at the first trial was legally insufficient . . . .' The government thus *fully supports* our argument that, in the circumstances presented, the second trial would itself be improper because it would violate petitioner's constitutional right not to be twice placed in jeopardy." (Emphasis supplied)

By withdrawing the concession, the government has afforded itself the opportunity to invoke a first-time argument that no double jeopardy violation is occasioned by a hung jury predicated on insufficient evidence (Br. 24-31), and it is, therefore, proper to retry petitioner. With the concession in place, it was impossible to advance that claim.[3]

On the other hand, that concession was heavily relied upon by: (1) the court of appeals' opinion (Pet. App. 5a-6a); (2) petitioner's reply to respondent's opposition to certiorari (Br. 1); (3) petitioner's brief on the merits (Br. 9-12); and (4) by necessary implication, this Court in granting the petition. The clearly manifest purpose of the government's eleventh-hour retrenchment, is nothing less than an unbecoming effort to scuttle a major assumption upon which the brief for petitioner rests. In reliance upon that concession we fairly concluded – as did the court of appeals – that the government agreed with our assertion

---

[3]Regardless of the objection lodged against the conclusion that petitioner has drawn from the concession (Br. 19 n. 14), in reality, the concession was only achieved because that precise conclusion must also have been drawn *by the government, i.e.*, "petitioner has raised a valid double jeopardy claim." It is unassailable in logic that the government's new argument (Br. 24-31), and the concession are mutually exclusive. Although the government weakly suggests that they may co-exist (Br. 31 n. 25), its own theory (Br. 24-31), destroys that notion. For, according thereto, appeal from a conviction at the second trial could never implicate double jeopardy concerns about the mistrial, because that first proceeding generated "no judicial determination of insufficiency – and therefore no double jeopardy claim . . . ." (Br. 27). There is no mistaking what the government is seeking to establish here; and that is the proposition that *any* number of mistrials bottomed on insufficient evidence present no enforceable double jeopardy claim and a conviction finally obtained on sufficient evidence must stand, because those mistrials "wipe the slate clean." (Br. 31 n. 25)

that insufficient evidence at the first trial generates a valid double jeopardy claim, and thereby narrowed the issue in this Court to whether appellate review of the claim should occur now or after a retrial (Br. 9-10). By abandoning its concession *in medias res*, the government feels free to rotate 180 degrees and now urge that we have raised no valid double jeopardy claim at all (Br. 24-31). Regardless of the merits of this new found learning, it has been forged by undeniably unfair means.[4]

In any event, withdrawl of the concession, we submit, subtracts nothing from the vitality of our double jeopardy claim. In the first place, this fresh government theory has been rejected by every circuit that has considered it. All agree – in accord with the withdrawn concession – that since *Burks*, a criminal defendant can challenge the sufficiency of the evidence presented at his first trial which ended in a hung jury when appealing his conviction at the second trial (Pet. Br. 9 n. 7). Even the instant case, which respondent seeks to affirm, so held (Pet. App. 5a-6a). According to the government's restrictive reading of *Burks*, petitioner can never raise a valid double jeopardy claim because he has not secured a *judicial determination* that the evidence at his mistrial (hung jury) was insufficient (Br. 24-34). Therefore, even though he has a theoretical right not to be retried, there is no *ruling* for an appellate court to give effect to and his right must, accordingly, forever remain inchoate and unenforceable.

---

[4]During the course of several hundred criminal trials and scores of appeals, we have stipulated with, conceded to, and otherwise given our word to opposing counsel many, many times. Once relied upon, it is unthinkable that we would thereafter renege on our word in an effort to enhance our cause. For such conduct, above any other, would assuredly and swiftly destroy our credibility in the legal community in which we toil.

*In limine*, this theory collides with cases such as *United States* v. *Jorn*, 400 U.S. 470 (1971), which enforce a double jeopardy right based upon mistrials declared even before the government completes presenting its evidence. As in the case at bar, those cases involve no prior *judicial determination* barring retrial — as defined by the government — other than one grounded in double jeopardy *per se*. "[I]t became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has long been established as an integral part of double jeopardy jurisprudence." *Crist* v. *Bretz*, 437 U.S. 28, 34 (1978). Undaunted, the government argues that this may be, but because petitioner's claim is noncollateral under *Abney* it is still not a *colorable* claim (Br. 28). Thus, a patently colorable claim is rendered nugatory, we are told, because it cannot be appealed now; *a fortiori*, since it doesn't exist presently it stands no chance of conception after a second trial. This Catch-22 logic further underscores the mandatory need for the government to have withdrawn its concession in order to illuminate us with its new theory.

Furthermore, had petitioner herein been convicted, the government would agree that his conviction, if based on insufficient evidence, must be reversed on appeal with directions to enter a judgment of acquittal under *Burks*. The enforceability of petitioner's double jeopardy claim perforce depends, according to the government, on the necessity for an erroneous second finding by the jury.[3] Under the inverted logic of respondent's brief, for peti-

[3]Since we must assume that the evidence at petitioner's trial was legally insufficient (Pet. Br. 10 n. 10), the trial court would have erred in submitting the case to the jury, and the jury would have erred in finding guilt on insufficient evidence.

tioner to prevail, it literally takes two wrongs to make him right. At bottom, the relevant inquiry is, why should petitioner suffer the denial of his double jeopardy protections because instead of erring completely, the jury came a step closer to the correct result. It does not appear rational to grant or deny a criminal defendant a right to enforce his double jeopardy claim upon the whim of a particular jury. This is especially true since we permit juries to act freely "without regard to logic." *United States* v. *Robinson*, 475 F.2d 376, 383 (D.C. Cir. 1973); *accord, Dunn* v. *United States*, 284 U.S. 390 (1932). From this angle of vision, the government's theory would appear to put a premium upon the ineffective assistance of counsel, because petitioner would have been better served had he been convicted at trial upon insufficient evidence. In reality, no matter what the jury did, the effect upon petitioner remains constant, *i.e.*, his double jeopardy rights would be violated by a retrial. For some reason, the government believes that the Double Jeopardy Clause is so flimsy a guarantee, that the ability to enforce its proscriptions vacillate with the gossamer considerations it has suggested. In these circumstances it is not unusual that no court of appeals has accepted respondent's theory of double jeopardy, and all hold that insufficient evidence resulting in a hung jury generates a valid double jeopardy claim — the majority of them albeit concluding, as in the instant case, that denial of the claim is not an *interlocutorily* appealable order.

Additionally, assuming we have yet to counter the government's argument, the prosecution herein had an unfettered opportunity to introduce evidence in support of the indictment. As we have assumed (Br. 10 n. 10), and demonstrated (Br. 16-26), that evidence was legally insufficient thus requiring the trial court to enter a judgment of acquittal. Had it properly ruled, petitioner would now be

discharged and not facing the prospect of erroneously "running the gauntlet" a second time. As in *Burks,* an appellate finding that the evidence was insufficient means that the trial court erred in not granting the Rule 29 motion. Thus would be abolished the "purely arbitrary distinction between those in [petitioner's] position and others who would enjoy the benefit of a correct decision by the District Court. [In these circumstances] [t]he Double Jeopary Clause forbids a second trial . . . ." *Burks* at 11 (citation omitted).

* * *

> "[Furthermore] [g]iven the requirements for entry of a judgment of acquittal the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple'." *Burks,* at 17.

When all is said and done, no matter how phrased, the government is seeking to have petitioner run the gauntlet a second time when its first effort was legally unsuccessful — this it cannot do consistent with the Double Jeopardy Clause.[6]

## II.

## REPLY TO BR. 20-24

In one argument the government urges the Court not to consider the facts of this case at all (Br. 39 n. 32), and in

---

[6]At this stage, in considering the government's claim, its prior concession should be construed against its present position. That concession was obviously the well-considered product of government counsel, who shared our view of the Double Jeopardy Clause in two courts over a long period of time. We do not really believe that the government's reversal of position is so much a reflection of its actual thinking, as it is an ill-considered, hasty reaction to petitioner's brief on the merits.

another urges it to reject petitioner's double jeopardy claim, not on a legal basis, but rather on a factual one (Br. 20-24). However, in presenting its *Greene* v. *Massey*, 437 U.S. 19, 26 n. 9 (1978), theory, the government seeks the resolution of a major unsettled issue (Br. 21) upon a scant reference to the evidence rather than offering a detailed analysis thereof; the very undertaking we must now pursue in order to expose the erroneous application of that theory to the facts of this case.

While Agent Lee was testifying on direct examination the prosecutor sought to elicit hearsay statements of Leroy Cooper, damaging to petitioner, which we objected to because the government had not yet "proved any conspiracy . . . ." (Tr. 40). After argument, the trial court sustained the objection and precluded hearsay testimony until and unless the conspiracy was established (Tr. 41-42). Once the remainder of the case was in evidence, the prosecutor again sought to elicit Cooper's statements contending that there was now substantial independent evidence of the conspiracy (Tr. 173). After a lengthy colloquy between counsel fully ventilating that issue (Tr. 173-187), the court ruled in the government's favor (Tr. 187), and Agent Lee was recalled to put the statements in evidence. Thus, at the time the court ruled, it had before it all of the evidence in support of the indictment save for the hearsay statements.[7] We thereafter moved for judgment of acquittal at

[7]Although a stipulation concerning the chemists' testimony, *i.e.*, that heroin was recovered and its strength (Tr. 188-189), still remained to be read to the jury, it was given to the court prior to argument on sufficiency (Tr. 170(A)-171), and relied upon by the prosecutor in urging that a conspiracy had been established by substantial independent evidence (Tr. 183).

the close of the government's case and again before its submission to the jury. J.A. 2a; Tr. 203-204, 276, 285-288.

Although the trial court ruled that the conspiracy charge had been proven prima facie enabling it to be submitted to the jury, it clearly had not been. Our brief exhaustively and conclusively demonstrates insufficient evidence to support that finding (Br. 16-26). The best the government can muster in response — after a sparse reference to the facts — is "that a conspiracy existed and that petitioner was a member of it." (Br. 39 n. 32) In making this footnote claim, the government cites no cases, does not analyze the thrust of the evidence, and does not really join issue with us in any meaningful way. Nonetheless, this meager counteroffer is as it should be, for we have always believed in good faith that the evidence was legally insufficient and that no competent lawyer could seriously contend otherwise.

From this vantage point our response to the government's *Greene* v. *Massey* theory is straightforward, *i.e.*, a finding of insufficiency as alleged by petitioner (Pet. Br. 16-26), is tantamount to a judgment of acquittal, has nothing whatever to do with trial error and accordingly, does not implicate the government's theory at all. Central to our reply is the assumption that the standard of review for determining whether or not a conspiracy has been established to allow for the introduction of hearsay statements, is at least as demanding as the one for testing sufficiency at the close of the government's case in a conspiracy trial in which there are no statements. Should the conspiracy fail in either case upon appellate inquiry, a resulting judgment of acquittal must obtain. The reason is clear. In the case with a statement, the trial court determines its admissibility only after the government, as here,

has presented all of its non-hearsay evidence in support of the conspiracy.[8] Therefore, a ruling on the sufficiency of the evidence to support the conspiracy does not rely at all upon the co-conspirator's statement and accordingly, that statement never enters the fact finding process to "contaminate" it under the government's *Greene* v. *Massey* theory.[9] Should the district court err on sufficency and ad-

[8] If the statement is admitted "subject to connection," that same inquiry is still made at the close of the government's case. Furthermore, in a conspiracy case, the government is likely to present all of its available evidence rather than face the prospect of a judgment of acquittal. As respondent concedes:

> "It would be absurd for the government to hold back a part of its evidence – risking acquittal and increasing the cost and uncertainty of litigation – in a misguided attempt to get a "second bite at the apple'." (Br. 38)

[9] At the close of the government's independent case – the statements not yet having been introduced – defense counsel in arguing for their exclusion, in effect, moves for a judgment of acquittal by claiming that a prima facie case of conspiracy has not been established. In the case at bar, for example, we addressed the court in those very terms using the *Glasser* standard of review (Tr. 175-176), and the court concurred in our framing of the inquiry in that manner. Indeed, had the court agreed with our analysis, it would unquestionably have directed a verdict of acquittal on the conspiracy right then. In the usual case, once the statements are admitted and the government rests, the process is repeated, but this time *pro forma* because the court has moments before heard and considered the very argument to be offered. All understand, however, that in renewing the motion for judgment of acquittal, defense counsel is making the precise claim as before *to preserve the record.* In legal contemplation, the court repeats its ruling and denies the motion without ever relying on the statements. It is for these reasons that the initial argument herein on statement admissibility extended over 14 pages of transcript (Tr. 173-187) and our renewed motion after the statements came into evidence consisted of:

> "Mr. Palmer: I would at this point *reiterate* the motion for judgment of acquittal. *Based on the denial* of that motion, we would move to sever count 2 from the indictment." (Tr. 203) (Emphasis supplied)

The fact that the court never considers the statements of co-conspi-

mit the statement, an appellate court would merely track the process and solely look to the independent evidence to determine whether or not a conspiracy had been established, at least sufficiently to take the question to the jury. This is precisely what appellate courts do on direct review all the time. In *United States* v. *Spanos*, 462 F.2d 1012 (9th Cir. 1972) for example, the trial judge found sufficient evidence of a conspiracy and admitted hearsay statements over objection. On appeal, the court found insufficient evidence of the alleged conspiracy, ignored the statements which adequately provided evidence of appellant's participation in a conspiracy, and reversed the case with directions to dismiss the indictment. Accord, *United States* v. *Bentvena*, 319 F.2d 916, 948-949 (2d Cir. 1963).[10]

---

rators in ruling on sufficiency is even more clearly demonstrated, perhaps, when we consider a case where the statements have been admitted "subject to connection."

In that case, at the conclusion of the government's case-in-chief, a motion for judgment of acquittal simultaneously addresses the sufficiency of the evidence to go to the jury and the sufficiency of the independent evidence to admit the statements. This is true because both inquiries require a consideration of exactly the same evidence and, the standard of review for the sufficiency question is no more demanding than the one for determining statement admissibility.

Thus, while these statements of co-conspirators may be in evidence, they are always subject to the condition precedent that there exists prima facie proof of the conspiracy *aliunde*.

[10]Although the court did not specifically state that the indictment should be dismissed on the conspiracy count, it is clear from the ruling that that was intended. Although two substantive counts were also reversed, they were the only ones "remanded for a new trial." 319 F.2d at 955.

To our knowledge, no case has ever held or suggested that the government's *Greene* v. *Massey* theory applies in the present context. In fact, of the cases cited to support its claim (Br. 20-21), only one is a conspiracy case and it points exactly the other way. *United States* v. *Sarmiento-Perez*, 667 F.2d 1239 (5th Cir. 1982) (at 1239, middle paragraph).

## STANDARD OF REVIEW

In determining the sufficiency of the evidence, the standard of review is whether the facts viewing them in the light most favorable to the government, affording it the benefit of all inferences that logically flow therefrom without regard to the credibility of witnesses, "present substantial evidence of guilt beyond a reasonable doubt." *United States* v. *Chesher*, 678 F.2d 1353, 1358 (9th Cir. 1982). This formulation recapitulates the well-known federal standard. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Jackson* v. *Virginia*, 443 U.S. 307, 317-318 (1979).

Prior to the adoption of the Federal Rules of Evidence, which became effective July 1, 1975, the same standard was applicable for reviewing whether or not a conspiracy was sufficiently established to permit the introduction of co-conspirators hearsay statements.

> "As a preliminary matter, there must be substantial, independent evidence of the conspiracy, *at least* enough to take the question to the jury . . . . Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge." *United States* v. *Nixon*, 418 U.S. 683, 701 n. 14 (1974) (Emphasis supplied).

This is, of course, the *Glasser* or prima facie[11] test. *Accord, United States* v. *James*, 590 F.2d 575 (5th Cir. 1979). If statements were admitted, the jury was then instructed that it could consider the hearsay against a particular defendant only if it first found, beyond a reasonable

[11]The term "prima facie case," which sometimes appears in appellate opinions, is also the trial lawyer's usual jargon which assumes the *Glasser* requisites for review in arguing a motion for judgment of acquittal.

doubt, that a conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. With the adoption of the Federal Rules of Evidence, courts of appeals have reconsidered the matter with a vengeance. Before we turn to the resulting thicket of conflicting opinions, it would be beneficial to first analyze the *Glasser* standard as it applies to a conspiracy indictment.

A conspiracy charge is not a spontaneous event. Normally, such allegation is investigated by trained federal agents whose findings are, in turn, reviewed by knowledgeable Assistant United States Attorneys. The process is further refined by presentation of the case to a grand jury and an indictment returned, whose allegations have by now been very thoroughly screened for evidentiary support. When this conspiracy count is again tested for sufficiency at the close of the government's case – assuming for present purposes that no statements are offered requiring a prior determination – the result is usually no contest. For while the standard of review sounds onerous, this is more apparent than real. It is at this stage in the proceeding that trial lawyers fully experience the import of viewing the evidence in the light most favorable to the government, without regard to the credibility of witnesses. Thus, – to cite an extreme example – if a thrice convicted perjurer testifies for the government and his testimony flushes out a conspiracy, all of the cross-examination in the world showing this perfidy, and more, is to no avail when moving for a judgment of acquittal. Nor, at the close of the entire case, would it matter that the defendant presented irreconcilable, countervailing testimony from disinterested clergymen. Although in this absurdly weak case the jury would, no doubt acquit, the point of it

is that the government would still get the case to the jury; *i.e.*, it would have presented a prima face case. It is apparent that this "view" of the evidence to test sufficiency, is a potent government ally in meeting that challenge. It is also clear that this standard of review represents the bottom line below which courts may not dip. *Jackson* v. *Virginia, supra.*

Since the new rules of evidence, all of the circuits have held that it is now up to the trial judge alone to determine the *admissibility* of this statement evidence and that the jury is to play no role in *that* determination. The confusion sets in when the courts attempt to effectuate that goal. See Fed. R. Evid. 104, 801 (d)(2)(E). The basic problem they are contending with is this. Prior to the new rules, trial judges were not fact finders, they merely made preliminary determinations whether or not a prima facie conspiracy charge had been established under the *Glasser* test. Now, we are told, they must determine whether or not a conspiracy, in fact, has been established. Normally, that type of determination is made at a separate hearing where competing evidence is introduced and the court resolves issues of credibility in reaching its result. *E.g.*, motions hearings to suppress evidence or exclude confessions. This undertaking in a conspiracy case would involve a mini-trial traversing all of the prosecution and defense evidence and is, accordingly, a burdensome, unworkable procedure. The following are some of the alternative solutions reached:

In *United States* v. *James,* 590 F.2d 575 (5th Cir. 1979), the court held that since statement admissibility, *vel non,* occurs prior to the defense case, the statement can come into the government's case-in-chief – preferably after all of the independent evidence of a conspiracy is introduced

– upon the *Nixon* standard. At the conclusion of all of the evidence the court must determine, *as a factual matter,* whether the conspiracy has been established by a preponderance of the evidence, independent of the statement itself. By using the *Nixon* test, *in limine,* the court believed that serious bootstrapping problems would be avoided. For, if statements of co-conspirators were permitted into evidence on lesser thresholds, and prosecutors could then rely upon them at the close of the case to argue a sufficiency not otherwise achieved, the result would condone the very bootstrapping of a statement to the "level of competent evidence" that this Court long ago condemned. *Glasser, supra,* 74-75; Pet. Br. 17. Thus, in a very real sense, if this were permissible the co-conspirator's out of court statement would then become the independent evidence of the very conspiracy on which its admissibility depended. It is our view, that if after a thorough investigation and the honing of its evidence, the government cannot even achieve the minimal requirements of a prima facie case to "at least" get it to a jury, it is fundamentally unfair to permit the government to reach this otherwise unattainable plateau by reaping the benefit of a hearsay statement. Once the alleged conspiracy fails, it should fail for all purposes. The *James* case, we submit, presents a rather reasonable compromise of the various competing interests. But see *infra,* p. 17 n. 13.

In *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978), the court held that because the trial judge is now the fact finder, "*a higher standard*" of admissibility is required than a prima facie test and adopted a preponderance of the evidence test. *Accord, United States* v. *Trotter,* 529 F.2d 806, 812 (3rd Cir. 1976) ("Since the 'fair preponderance' standard is more severe than the prima facie standard, admission of hearsay under the former would *a for-*

*tiori* satisfy the latter.")[12] *Santiago,* falters, however, because it does not advise trial courts how to apply this standard prior to the defense case. The admissibility of these statements, obviously, cannot wait until the defense presentation, because a defendant is entitled to move for a judgment of acquittal at the close of the government's case-in-chief Fed. R. Crim. P. 29(a). *Santiago* also reviews the various circuit holdings, concluding that most of them have adopted the fair preponderance test, while two still maintain the prima facie *Nixon* standard.

To this cauldron we add the D.C. Circuit. In *United States* v. *Jackson,* 627 F.2d 1198, 1219-1220 (D.C. Cir. 1980), the court adopted a substantial, independent evidence of a conspiracy test. It then isolated itself from the other courts of appeals, by concluding that this quantum of evidence is less than that required to take the conspiracy question to the jury. Its rationale for doing so is as follows:

> "As the first determination demands only that existence of the conspiracy be proved by substantial independent evidence, proof would seem to be easier than that required to persuade the judge that a reasonable juror could be convinced of guilt beyond a reasonable doubt." 627 F.2d at 1220.

Why this is so we are not told. Nor are we or trial judges advised of the difference between substantial independent evidence and substantial independent evidence *at least* enough to take the question to the jury. Furthermore, as

---

[12]The reason the fair preponderance of the evidence test is more severe, is because it assumes that the government has first established a prima facie case under *Glasser*. A trial judge cannot balance competing evidence as a fact finder, if the scale on the government's side is empty.

best we can decipher this opinion, it appears not to require the judge to make a factual finding concerning the evidence, but rather, merely a finding that substantial, independent evidence exists. This case, in addition to allowing the bootstrapping of statement evidence to prove sufficiency, provides for a lesser threshold of admissibility after adoption of the new rules than *Nixon* required before them. Thus, on less evidence than the constitution requires to prove the elements of an offense sufficient to submit to a jury, the court permits introduction of these statements for unfettered use by both the court and jury. This ruling effectively obliterates *any* measure of protection to criminal defendants in admitting these statements. It should be borne in mind that these hearsay utterances are eagerly pressed upon the court by prosecutors, because they are extremely damaging to one or more defendants on trial. Once admitted for the truth, defense counsel cannot cross-examine the absent declarant and is usually found confronting a federal agent through whom the statements are offered. Statements, incidentally enhanced by the agent's own inherent credibility when he repeats them on the witness stand. This holding, obviously, cannot be correct, and we consider it an aberration in the circuits.

In any event, whatever true test may emerge, it is clear that it will, at least, be equal to the *Glasser* standard of review.[13] Accordingly, while the government urges that

[13]The Court should resolve this issue now, in considering the government's *Greene* v. *Massey* claim. Should that occur, we suggest that no present test suffices. The reason is that none of the alternatives surmounts the absence of a hearing or mini-trial, at which the factual issues would be fully ventilated prior to admitting these statements. Even the *James* case does not solve the problem realistically. That case reinstitutes the prima facie test of admissibility at the same time it excises the jury instruction which, at least, afforded defendants some measure of protection against the indiscriminate use of these

this case "provides an opportunity to resolve the issue left open in *Greene* v. *Massey*" (Br. 21), as we have demonstrated, that issue has never surfaced here.

Alternatively, if we are in error, the government's theory fails for another reason. As demonstrated in petitioner's brief (Br. 25), should both sales be attributed to petitioner, a conspiracy would still not be proved under any standard of review. This is true because the one and only damaging effect of all of the hearsay statements is to link him to the first sale.[14]

## III

## REPLY TO BR. 35

Most of the *in terrorem* arguments advanced in this section of respondent's brief (Br. 34-39) were already considered by petitioner (Pet. Br. 16 n. 18). One observation, however, deserves comment. Respondent fears interlocutory appeal and attendant delay in "almost every prosecution in which there is a mistrial after the close of the government's case." (Br. 35) At worst, this does not

statements. That approach is justified by the requirement that the court thereafter make a factual determination at the close of all of the evidence, as to whether or not a conspiracy has been established by a preponderance of the evidence. To us, it is pure fiction to believe that a trial judge will ever strike these statements and thereby provoke a mistrial, in a case consuming up to three months or more to try, having once allowed them into evidence under the *Glasser* test. Since the mini-trial approach is not feasible, the best solution is probably the one suggested by some commentators who believe that new Rule 104 changes nothing and that the *Nixon* test should still prevail.

[14]Although respondent states that we do not contend that the evidence is insufficient if the allged co-conspirator's statements are considered (Br. 39 n. 32), this is error, and we do so contend. We never have had reason to so state before, because this is the first time respondent has urged its *Greene v. Massey* theory.

amount to much. We stated in our petition that the Administrative Office reported that,

> "for the twelve months ending December 31, 1982, the total number of cases retried after a mistrial in the entire federal system was 58.[9] This figure includes hung juries and mistrials for every other reason for which mistrials are declared, since no separate statistics are kept for hung juries."

[9]"Federal Judicial Workload Statistics, Ad. Off. U.S. Courts, Table D-2, P. A-36" (Pet. 8)

Respondent never mentions these data in any of its pleadings nor, of course, seeks to show to the contrary. Of those 58 cases, very few could be the basis of a good faith interlocutory double jeopardy appeal because valid insufficiency claims are so rare.[13] *Accord, Jackson* v. *Virginia,*

[13]The government speculates that since a motion for judgment of acquittal is routine in criminal cases, *every* mistrial – regardless of cause – declared after the close of the government's case portends a frivolous interlocutory appeal to delay the proceedings. Since it is impossible to predict which cases will terminate in mistrials, the government has this time impugned the integrity of every lawyer for every defendant in every federal district court.

Equally unfounded is the insinuation that the instant appeal is of that dilatory genre (Br. 35 n. 27 and text). Although the mistrial herein was declared on June 26, 1981 – erroneously reported as June 6 by respondent (*id.*) – and retrial then scheduled for September 14, 1981, the district court did not rule on our oustanding motions for judgment of acquittal and to bar retrial on double jeopardy grounds until September 11, 1981 (J.A. 3a-4a, 20a). On that very day we filed a notice of appeal (J.A. 4a), and because we expected the district court to rule against us, we had prepared our appellate brief prior to that denial (J.A. 20-21). The brief was refined and filed in the court of appeals on September 24, 1981. It is ironic, that although petitioner had moved with such celerity to avoid any suggestion that the appeal was taken for purposes of delay, we are now confronted with that very accusation. Subsequent events reveal, however, that it was the government who tarried.

443 U.S. 307, 329 (1979) (Justice Stevens concurring). The bottom line is, should petitioner prevail, that result would generate but a trickle of appellate cases.

Respectfully submitted,

Allan M. Palmer
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

*Counsel for Petitioner*
Robert D.H. Richardson

January, 1984

---

After numerous delaying motions (J.A. 5a-7a), the government filed its brief on April 8, 1982 (J.A. 7a), almost seven months after petitioner. The latter filed his reply on April 14, 1982 (J.A. 7a). When oral argument was scheduled for June 4, 1982 the government moved to reschedule it so that counsel who was to argue the case could go on vacation (J.A. 7a). When it was finally argued on October 4, 1982 (J.A. 8), another, not so well rested lawyer argued the cause for the government. The balance of the time has been consumed by the normal appellate processes leading to the instant review.

Should petitioner prevail herein, succeeding cases will routinely be decided and frivolous appeals "weeded out." *Abney* v. *United States*, 431 U.S. at 662 n. 8. The latter prospect, according to the government (Br. 36), is so complicated in this type of case that it is not really a feasible alternative. In our judgment, however, given the opposing briefs of counsel, it can rapidly be determined whether or not a sufficiency of the evidence claim presents a truly justiciable issue requiring full review.

(THIS PAGE INTENTIONALLY LEFT BLANK)

o. 82-2113-CFY
tatus: GRANTED

ocketed:
une 27, 1983

Title: Robert D. H. Richardson, Petitioner
v.
United States

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Palmer, Allan M.

Counsel for respondent: Solicitor General

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 27 1983 | G | Petition for writ of certiorari filed. |
| 3 | Jul 28 1983 | | Order extending time to file response to petition until August 27, 1983. |
| 4 | Aug 15 1983 | | Supplemental brief of petitioner Robert D. H. Richardson filed. |
| 5 | Aug 30 1983 | | Brief of respondent United States in opposition filed. |
| 6 | Aug 31 1983 | | DISTRIBUTED. September 26, 1983 |
| 7 | Sep 6 1983 | X | Reply brief of petitioner Robert D. H. Richardson filed. |
| 9 | Oct 3 1983 | | REDISTRIBUTED. October 7, 1983 |
| 10 | Oct 11 1983 | | Petition GRANTED. |
| | | | ********** |
| 11 | Oct 24 1983 | | Record filed. |
| 12 | Oct 24 1983 | | Certified original record on appeal & c.a. proceedings received. |
| 13 | Nov 16 1983 | | Brief of petitioner Robert D. H. Richardson filed. |
| 14 | Nov 16 1983 | | Joint appendix filed. |
| 15 | Dec 21 1983 | | Brief of respondent United States filed. |
| 16 | Jan 11 1984 | | Reply brief of petitioner Robert D. H. Richardson filed. |
| 17 | Feb 14 1984 | G | Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice filed. |
| 18 | Feb 14 1984 | | SET FOR ARGUMENT. Tuesday, March 20, 1984. (2nd case) |
| 19 | Feb 15 1984 | | CIRCULATED. |
| 20 | Feb 27 1984 | | Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice GRANTED. |
| 21 | Mar 20 1984 | | ARGUED. |
| 22 | Mar 23 1984 | P | Motion of petitioner Robert D. H. Richardson for leave to file a Supplemental Brief filed. |